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MEDDLING WITH THE MULLAHS: AN ANALYSIS OF THE IRAN AND LIBYA SANCTIONS ACT OF 1996

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"As the dominant power, [the United States] can afford to add the legitimizing carrot of negotiations to the punitive stick of sanctions."[1]

I. INTRODUCTION

On August 5, 1996, President William J. Clinton signed the Iran and Libya Sanctions Act of 1996 into law.[2] This statute, dubbed by some as the D'Amato-Kennedy Act after its two chief legislative sponsors,[3] was introduced in the United States (U.S.) Senate as Senate Bill 1228 on September 8, 1995 and in the U.S. House of Representatives as House Bill 3107 on March 19, 1996.[4] The bill received little attention until the summer of 1996 when two events combined to bring its enactment to fruition. On June 25, 1996, a truck bomb was detonated outside of Khobar Towers, a U.S. military housing compound located near Dhahran, Saudi Arabia, resulting in the death of nineteen American servicemen.[5] One month later, on July 17, 1996, Trans-World Airlines

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1. Richard W. Murphy, *It's Time to Reconsider the Shunning of Iran*, WASH. POST, July 20, 1997, at C1. Murphy served as U.S. Ambassador to Syria and Saudi Arabia and as Assistant Secretary of State for Near Eastern and South Asian Affairs from 1983 to 1989.

2. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) [hereinafter ILSA].

3. The chief legislative sponsor of ILSA was United States Senator Alfonse M. D'Amato (Republican, New York). *See* Clay Chandler, *U.S. Expects Furor Over Trade Sanctions at Summit*, WASH. POST, June 27, 1996, at A20. *See also Urgent Paris Warns Washington over Sanctions Law*, AGENCE FR.-PRESSE, Sept. 29, 1997, *available in* 1997 WL 13404030.

4. H.R. REP. NO. 104-523(I), at 13-14 (1996).

5. *See Saudis Finish Bomb Probe*, CHI. TRIB., Mar. 31, 1998, at 7, *available in* 1998 WL 2840770. *See also* Chandler, *supra* note 3, at A20. Initial optimism that responsibility for the bombing could be attributed to Iranian-sponsored terrorists based in Saudi Arabia has faded as the investigation has proceeded. *See* Toni Locy, *Informant in Bombing has a Change of Heart*, HOUS. CHRON., July 31, 1997, at 5, *available in* 1997 WL 6570713. Saudi Arabia closed its investigation of the attack on March 30, 1998. *See Saudis Finish Bomb Probe*, *supra* at 7. The U.S. Military now doubts whether it will ever be able to "establish a 'solid line' tying Iran to the terror attack." Charles J. Hanley, *Un-*

Flight 800 inexplicably exploded in mid-air and crashed off the coast of Long Island, New York resulting in the loss of 230 lives.[6] In the atmosphere of outrage and panic over the perceived threat of international terrorism stirred by these incidents, the bill was quickly passed by the Senate on July 16, 1996 and the House of Representatives on July 23, 1996.[7] In response to the national outcry for retaliatory action - and perhaps not wishing to appear weak on the issue of international terrorism in an election year - President Clinton endorsed its provisions two weeks later.[8] The U.S. trade embargo against Iran escalated to a new level at the stroke of the President's pen.

At its core, the Act has four purposes. Initially, ILSA purports to address the threat to U.S. national security and foreign policy objectives posed by Iranian and Libyan attempts to acquire weapons of mass destruction and sponsorship of acts of international terrorism.[9] However, the sponsors of ILSA acknowledged that unilateral efforts by the United States were insufficient to adequately address these threats.[10] As a result, ILSA attempts to multilateralize U.S. efforts to isolate Iran. Initially, ILSA urges the President to commence diplomatic efforts through the United Nations and consultation with U.S. allies in order to establish a multilateral sanctions regime against Iran, including provisions limiting the development of its petroleum resources.[11] ILSA also authorizes the imposition of economic sanctions upon persons determined by the President to have made investments in Iran of at least $40 million in any one year that directly contributed to Iran's ability to develop its petroleum resources.[12] Persons subject to sanctions must have actual knowledge or reason to know that their investment would

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answered Questions,Unending Delays in Saudi Bombing Investigation, ASSOC. PRESS, Mar. 1, 1997, *available in* 1997 WL 4857484. Responsibility for the attack remains undetermined as of the time of preparation of this article.

6. Michele Salcedo, *Tape Shows Other Pilots Saw TWA 800 Explode*, AUSTIN AM.-STATESMAN, Jan. 15, 1998, at A10, *available in* 1998 WL 3593269. *See* Paul Blustein, *House Passes Measure Against Foreign Firms Investing in Iranian, Libyan Oil*, WASH. POST, July 24, 1996, at A25. Despite initial speculation that a terrorist bomb brought the airliner down, an exhaustive investigation by several U.S. agencies including the Federal Bureau of Investigation and the National Transportation Safety Board eliminated this possibility. *See TWA Flight 800 Explained*, WASH. TIMES, Dec. 9, 1997, at A18, *available in* 1997 WL 164. The investigation is now focused on mechanical explanations for the explosion. *Id.* The cause of the explosion remains undetermined as of the time of preparation of this article.

7. H.R. REP. NO. 104-523(I), at 1.

8. *See* Eric Pianin, *Clinton Approves Sanctions for Investors in Iran, Libya*, WASH. POST, Aug. 6, 1996, at A8, *available in* 1996 WL 10724877.

9. *See* ILSA, Pub. L. No. 104-172, § 2(1), 110 Stat. 1541, 1541 (1996). *See also* H.R. REP. NO. 104-523(II), at 3 (1996).

10. *See* H.R. REP. NO. 104-523(I), at 3. *See also* H.R. REP. NO.104-523(II), at 2.

11. *See* ILSA § 4(a). *See also* H.R. REP. NO. 104-523(II), at 3.

12. *See* ILSA § 5(a). *See also* H.R. REP. NO. 104-523(I), at 12.

directly contribute to Iran's ability to develop its petroleum resources.[13] The President is required to impose at least two sanctions from a list set forth in ILSA against persons deemed to have violated the investment prohibition.[14] This sanctions regime is designed to discourage foreign investment in Iran's petroleum industry, thereby denying it the financial means to sustain its nuclear, chemical, biological and missile weapons programs and sponsorship of international terrorism.[15] Finally, ILSA purports to place additional pressure upon the Libyan government to comply with United Nations Security Council Resolutions 731, 748, and 883 by demanding the cessation of Libyan sponsorship of international terrorism and efforts to acquire weapons of mass destruction,[16] and by demanding the surrender of two Libyan intelligence agents implicated in the bombing of Pan Am Flight 103 on December 21, 1988.[17] Furthermore, all provisions of ILSA applicable to Iran are equally applicable to investments in Libya.[18] The President must report to Congress on a regular basis on his efforts to accomplish the purposes set forth in ILSA.[19]

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13. *See id.*

14. *See* ILSA § 5(a). *See also* H.R. REP. NO. 104-523(I), at 2.

15. *See* ILSA § 2(2). *See also* H.R. REP. NO. 104-523(II), at 3.

16. *See* S.C. Res 731, S/RES/731 (1992). *See also* S.C. Res. 748, S/RES/748 (1992).

17. *See* S.C. Res. 883, S/RES/883 (1993). Flight 103 exploded over Lockerbie, Scotland on December 21, 1988, killing all 259 people on board as well as eleven people on the ground. *See Khomeini Ordered Bombing Over Lockerbie, Report Says*, DALLAS MORNING NEWS, July 6, 1997, at 17A, *available in* 1997 WL 11502927.

18. *See* ILSA § 5(1)(B). *See also* H.R. REP. NO. 104-523(I), at 7. The effects of ILSA upon Iran and its trading partners are more controversial than those relating to Libya due to the prior imposition of economic sanctions upon Libya by the Security Council and the pledge of United Nations members to enforce those sanctions. *See* Thomas W. Lippman, *Panel Approves Sanctions for Foreign Firms Investing in Iran*, WASH. POST, June 14, 1996, at A1. As a result, this article will focus on the effects of ILSA upon Iran and its trading partners. For its part, Libya's official news agency JANA condemned ILSA as a "flagrant injustice" arising from "satanic designs . . . designed as a veto on the independence, freedom and development of nations." *Agency Editor Comments on Renewal of Sanctions Against Libya*, BRITISH BROAD. CORP., Jan. 26, 1996.

19. *See* ILSA §§ 4(b), 4(d)(2), 4(e), 9(a)(4), 9(c)(1), 10(a) and 10(b). *See also* H.R. REP. NO. 104-523(I), at 7; H.R. REP. NO. 104-523(II), at 3. The summary of the purposes set forth in the text are those of the U.S. Congress. In signing ILSA into law, President Clinton described Iran and Libya as "two of the most dangerous supporters of terrorism in the world." Pianin, *supra* note 8, at A8. According to President Clinton, the legislation was designed to accomplish two purposes with regard to the terrorist threats posed by Iran and Libya. Initially, ILSA would deny Iran and Libya resources necessary to finance international terrorism and the acquisition of weapons of mass destruction. *Id.* Secondly, ILSA would place the issue of international terrorism upon the agenda of every state engaging in trade with Iran and Libya by requiring "every advanced country . . . to make up its mind whether it can do business with people by day who turn around and fuel attacks on their innocent civilians by night." *Id. See also* Muriel Dobbin, *Clinton Signs Libya, Iran Sanction Bill*, ORANGE COUNTY REG., Aug. 6, 1996, at A3, *available in* 1996 WL 7042186. President Clinton may also have been motivated by U.S. outrage over the execution of a contract between the Iranian government and the French petrochemicals firm Total SA for the development of two large Iranian oil and gas fields located in the

The Act attempts to accomplish its purposes with three specific methods. Initially, Section 4(a) of the Act urges the President to immediately commence diplomatic efforts in appropriate international forums and in bilateral negotiations to establish a multilateral sanctions regime against Iran including limitations upon foreign investments in Iran's petrochemicals industry.[20]

The second method by which the Act accomplishes its purposes is through increased consultation between the President and Congress regarding U.S. policy toward Iran. Sections 4(b) and 10(a)(1) require the President to report to Congress on a periodic basis regarding his efforts to establish a multilateral sanctions regime against Iran.[21] ILSA also requires the President to report to Congress on whether the European Union, the Republic of Korea, Australia, Israel and Japan have legislative or administrative standards providing for the imposition of trade sanctions against persons doing business or having investments in Iran.[22] The President is additionally required to report to Congress on Iran's military capabilities and support of international terrorism including the extent to which the International Atomic Energy Agency has established regular inspections of all nuclear facilities in Iran and Iran's use of its diplomats and representatives to promote acts of terrorism.[23]

Finally, ILSA provides for the imposition of economic sanctions upon persons who, with actual knowledge, make an investment of $40 million or more in any twelve month period which directly and significantly contributes to the enhancement of Iran's ability to develop its petroleum resources.[24] These sanctions include prohibitions upon transactions between the sanctioned person, U.S. financial institutions and the Export-Import Bank of the United States, procurement sanctions, and import and export sanctions.[25] Sections 4(c), 5(f), 9(a) and 9(c) grant the President broad authority to grant exceptions and waivers as well as delays in the imposition of sanctions.[26] In any event, sanctions imposed pursuant to ILSA must remain in effect for a period of two years or until either Iran or the sanctioned person modifies their objectionable be-

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Persian Gulf. This contract was executed on July 13, 1995, four months after President Clinton barred Conoco and other American companies from participating in the project. *See* Exec. Order No. 12,957, 3 C.F.R. § 332 (1995). Executive Order No. 12,957 prohibited the financing, management or supervision by U.S. persons of the development of Iranian petroleum resources. *See id.* at § 1(a)-(c). *See also* International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(A) and (B)(1994) [hereinafter IEEPA].

20. *See* ILSA § 4(a).
21. *See id.* §§ 4(b) and 10(a)(1).
22. *See id.* § 4(e).
23. *See id.* §§ 10(a)(3)-(4) and 10(b)(1)-(2).
24. *See id.* § 5(a).
25. *See id.* § 6(1)-(6).
26. *See id.* §§ 4(c), 5(f), 9(a), and 9(c).

havior.[27]

International reaction to the adoption of ILSA was universal, immediate and unequivocally hostile. Canada, the largest trading partner of the United States, amended its Foreign Extraterritoriality Act to provide for fines and prison terms for company managers who comply with orders entered pursuant to the Act.[28] The European Union filed a formal protest to ILSA with the United States on August 8, 1996.[29] European Union officials objected to ILSA as "an extreme case of extraterritorial legislation"[30] and an inappropriate and ineffective means of combating international terrorism.[31] European Union officials warned the United States that the imposition of sanctions against European firms transacting business in Iran would seriously damage relations and would lead to the enactment and enforcement of retaliatory measures against American business interests.[32] The European Union also threatened to initiate a challenge to ILSA before the World Trade Organization (WTO) as a violation of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[33]

Even U.S. Persian Gulf allies living directly under the threat of Iranian expansionism expressed doubts about further American attempts to isolate Iran as exemplified by ILSA. A statement issued at the conclusion of the eighth summit of the Organization of the Islamic Conference,[34] held in Tehran in December 1997, criticized U.S. attempts to penalize countries doing business with Iran.[35] This criticism was ech-

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27. *See id.* §§ 8(a) and 9(b).

28. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 5, 7 (1984) (Can.).

29. *See EU Protests Law on Iran, Libya Sanctions*, HOUS. CHRON., Aug. 9, 1996, at 30, *available in* 1996 WL 11558085.

30. Blustein, *supra* note 6, at A25. *See also France Defends Firm's Gas Pact with Iran*, BUFF. NEWS, Sept. 30, 1997, at A2, *available in* 1997 WL 6464384; *U.S. Frustrated Over French-Iranian Gas Deal*, XINHUA ENG. NEWSWIRE, Oct. 1, 1997, *available in* 1997 WL 11202513; *U.S. Investigating Iranian Gas Deal*, ASSOC. PRESS, Sept. 29, 1997, *available in* 1997 WL 4885712.

31. *See EU Protests Law on Iran, supra* note 29, at 30.

32. Blustein, *supra* note 6, at A25. *See also* Raf Casert, *EU Warns U.S. Relations Will Suffer if French Iran Deal Challenged*, ASSOC. PRESS, Sept. 30, 1997, *available in* 1997 WL 4885966; Bill Mintz, *EU Tells Washington not to Meddle*, HOUS. CHRON., Oct. 1, 1997, at 3, *available in* 1997 WL 13071837; *Urgent Paris Warns Washington Over Sanctions Law*, *supra* note 3.

33. Raf Casert, *EU Nations "100 Percent" Behind France in Iran Oil Deal*, ASSOC. PRESS, Oct. 6, 1997, *available in* 1997 WL 4886682. *See also* Jana Byron, *Sanctions Corner, France's Total Ignores ILSA*, EXPORT PRACTITIONER, Oct. 15, 1997, at 13, *available in* 1997 WL 8530724; *EU Protests Law on Iran, Libya Sanctions*, *supra* note 29, at 30; *U.S. to Investigate Total's Deal with Iran*, XINHUA ENG. NEWSWIRE, Oct. 6, 1997, *available in* 1997 WL 11203425.

34. *See* John Lancaster, *Iran Seeks New Image at Summit*, WASH. POST, Dec. 22, 1997, at A23. The Organization of the Islamic Conference was created in 1969 and meets every three years. *See id.* The Conference consists of representatives of Islamic countries located in Europe, the Middle East and Africa. The eighth summit was the first hosted by Iran and drew representatives from fifty-five Islamic countries. *See id.*

35. *See* Phil Chetwynd, *Moslem Leaders Condemn Terrorism, Israel as Summit Ends*,

oed in a statement issued at the end of the annual summit of the Gulf Cooperation Council[36] in December 1997 welcoming Iranian overtures to lessen tensions in the Persian Gulf.[37] The leader of one of the U.S. closest Gulf allies, Sheik Hamad bin Khalifa Al-Thani of Qatar, called for dialogue between Iran and the U.S.,[38] and Saudi Arabian Crown Prince Abdullah offered to act as an intermediary in such discussions.[39]

This article examines the provisions of ILSA and its consistency with the U.S. international and national interests. This article first examines in detail the history preceding the adoption of ILSA with specific concentration on diplomatic and economic relations between the U.S. and Iran since 1979 and the resultant imposition of U.S. trade sanctions against Iran. It then examines the specific provisions of ILSA with emphasis on its most controversial element - the imposition of unilateral economic sanctions upon persons who invest in Iran's petrochemicals industries. Finally, this article analyzes ILSA in light of the U.S. international and national interests. This article concludes that ILSA is inconsistent with the promotion of the international and national interests of the United States.

II. HISTORICAL BACKGROUND OF THE IRAN AND LIBYA SANCTIONS ACT

Although a complete history of the volatile relationship between the United States and Iran is beyond the scope of this article, a brief review of the recent highlights of this relationship is in order to place ILSA in its proper context. Modern Iranian history began in 1921 when Reza Khan, an Iranian officer of the Persian Cossack Brigade, engineered a coup d'état against the government of Ahmad Shah of the Qajar dynasty.[40] Reza Khan ousted Ahmad Shah and gained complete control of the government in 1925.[41] Reza Khan subsequently declared himself Shah, ruling as Reza Shah Pahlavi until his forced abdication following

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AGENCE FR.-PRESSE, Dec. 11, 1997, *available in* 1997 WL 13452786.

36. The Gulf Cooperation Council consists of the leaders of Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Oman and Bahrain. *See* Ashraf Fouad, *Gulf Arabs Cautiously Positive Toward Iran,* WASH. POST, Dec. 22, 1997, at A23.

37. *See id.*

38. *See Rejecting Advice, U.S. Stands Firm on Iran,* ASSOC. PRESS, June 12, 1997, *available in* 1997 WL 4870452.

39. *See* Anthony Shadid, *Despite Hope for Moderation, Iran's Leader Blasts West, Israel,* ASSOC. PRESS, Dec. 9, 1997, *available in* 1997 WL 4895949.

40. U.S. DEP'T OF STATE, BACKGROUND NOTES: IRAN 2 (1994), (visited Sept. 12, 1998) <http:www.state.gov/www/background_notes/iran_794_bgn.html> [hereinafter IRAN: STATE DEP'T NOTES]. Reza Khan became minister of war as a result of the 1921 coup d'état. *Iran's History in Brief,* at 10 (visited Sept. 12, 1998) <http://www.salamiran.org/IranInfo/General/History.html> [hereinafter *Iran's History*].

41. *Iran's History, supra* note 40, at 9.

the occupation of Iran by British and Soviet forces in September 1941.[42] Reza Shah Pahlavi was succeeded by his son, Mohammad Reza Pahlavi, who ruled Iran until January 1979.[43]

Mohammad Reza Pahlavi's regime faced two serious threats to its existence during its thirty-eight year tenure. The first threat occurred in 1951 when Premier Mohammed Mossadeq, an advocate of the nationalization of British petroleum interests in Iran,[44] briefly assumed power and forced the Shah to flee the country.[45] The Shah returned to Iran after his supporters succeeded in ousting Mossadeq in a coup d'état in August 1953.[46] Mossadeq's ouster remains a contentious issue in present-day American-Iranian relations due to the role of the Central Intelligence Agency in leading and financing the coup.[47] Shortly after his return to power, the Shah agreed to a new charter that granted American and British oil interests forty percent each of Iranian oil revenues.[48] The Shah also received $85 million in American economic aid.[49]

In 1978, domestic turmoil swept Iran as a result of religious and political opposition to the Shah's increasingly autocratic rule. One example of the Shah's tendencies in this regard was his utilization of SAVAK - the internal security and intelligence service - which conducted operations against political dissidents utilizing summary execution, disappearance, torture and other human rights violations.[50] Mass demonstrations against the Shah's regime occurred throughout Iran, and strikes became more widespread and frequent.[51] The Shah fled Iran on January 16, 1979 as confrontations between his supporters and demonstrators became more violent.[52] On February 10, 1979, Shapur Bakhtiar, the Shah's last prime minister, declared martial law in an attempt to maintain order until a provisional government could be

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42. IRAN: STATE DEP'T NOTES, *supra* note 40, at 3. Reza Shah Pahlavi was forced to abdicate by the British military force occupying Iran due to his refusal to permit the Allies to supply the Soviet Union through his country. *See Iran's History, supra* note 40, at 9. Reza Shah Pahlavi died in exile in South Africa in 1944. *Id.*

43. IRAN: STATE DEP'T NOTES, *supra* note 40, at 3. *See also Iran's History, supra* note 40, at 10.

44. Under Mossadeq's leadership as prime minister, the Iranian government expropriated the Anglo-Iranian Oil Company and formed the National Iranian Oil Company [hereinafter NIOC] to operate the industry. *See The Oil and Gas Industry in Iran* (visited Sept. 12, 1998) <http://www.salamiran.org/IranInfo/State/Government/Energy/index.html>.

45. IRAN: STATE DEP'T NOTES, *supra* note 40, at 3.

46. *See id.*

47. JAMES T. PATTERSON, GRAND EXPECTATIONS 284 (1996).

48. *See id.* at 284-85.

49. *See id.*

50. IRAN: STATE DEP'T NOTES, *supra* note 40, at 3.

51. *Iran's History, supra* note 40, at 10.

52. *See id.* The Shah subsequently went into exile in Panama, and later Egypt where he died in July 1980. *See Key Dates in Iran's History and Dealings With the United States*, ASSOC. PRESS, Feb. 9, 1998, *available in* 1998 WL 6641041.

formed.[53] However, Bakhtiar's attempt failed in the rising tide of Islamic fervor which swept the country upon the return of its spiritual leader, the Ayatollah Ruhollah Khomeini.

On February 1, 1979, Ayatollah Khomeini returned to Iran from exile in France.[54] Khomeini's opposition to the Shah's regime had resulted in his arrest in June 1963 and exile in April 1964.[55] While in exile in Turkey, Iraq and France, Khomeini continued to actively oppose the Shah's regime and developed the principles of Islamic governance which were to sweep Iran upon the Shah's abdication.[56] Upon his return, Khomeini quickly assumed leadership of the revolutionary movement and replaced the Bakhtiar regime with a new theocratic republic guided by Islamic principles.[57] A new constitution enshrining the principles of Islamic governance was approved in a general referendum in December 1979,[58] and Khomeini assumed the role of national religious leader and titular head of state.[59] The president of the Islamic republic, Ayatollah Sayyed Ali Khamenei, succeeded Khomeini as national religious leader upon Khomeini's death on June 3, 1989.[60] The speaker of the national assembly, Ali Akbar-Hashemi Rafsanjani, was elected to the presidency in August 1989 to replace the outgoing Khamenei.[61] Rafsanjani was subsequently re-elected in June 1993.[62]

The December 1979 constitution defines Iran's political, economic and social order. The constitution declares Shi'a Islam of the Twelver Ja'fari sect as Iran's official religion.[63] Governance in Iran is based upon "[d]ivine revelation and its fundamental role in setting forth the laws."[64] As a result, all laws, regulations and constitutional interpretations must be based upon Islamic criteria.[65] These criteria include the elimination of imperialism and prevention of foreign influence in Iran[66] as well as the political, economic and cultural unification of all Moslems in a single nation.[67]

Political power in post-revolutionary Iran is divided amongst four branches of government. The highest authority is the leader who exer-

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53. *See Iran's History, supra* note 40, at 11.

54. IRAN: STATE DEP'T NOTES, *supra* note 40, at 4.

55. *Biography of Ayatollah Ruhollah Khomeini* (visited Sept. 12, 1998) <http://www.salamiran.org/IranInfo/State/Leadership/Imam/ImamBiography.html>.

56. *See id.* at 2-3.

57. IRAN: STATE DEP'T NOTES, *supra* note 40, at 4.

58. *Iran's History, supra* note 40, at 11.

59. IRAN: STATE DEP'T NOTES, *supra* note 40, at 4.

60. *See id.*

61. *See id. See also Iran's History, supra* note 40, at 10.

62. IRAN: STATE DEP'T NOTES, *supra* note 40, at 4.

63. IRAN CONST. § 1, art. 12 (1992). Zoroastrianism, Judaism and Christianity are the only other religions permitted to be practiced in Iran. *Id.* § 1, art. 13.

64. *Id.* § 1, art. 2(2).

65. *See id.* § 1, art. 4.

66. *See id.* §§ 1, art. 3(5) and 10, art. 152.

67. *See id.* § 2, art. 11.

cises the combined supreme political and religious power.[68] The position of leader embodies the doctrine of vali-efaqih which provides that the leader is God's vice-regent on Earth.[69] The leader is selected by the Assembly of Experts whose members are selected by universal suffrage.[70] The leader is responsible for delineation of the general policies of the country, appointment of the Guardian Council, the supreme judicial authority, commanders of the armed forces, and resolution of disputes between the other branches of government.[71] The leader is also the commander-in-chief of the armed forces and retains control over foreign policy and the interior and intelligence ministries.[72]

After the leader, the president is the highest official in the country.[73] The president is elected by universal suffrage to a four year term and may be reelected once.[74] The president appoints and supervises the Council of Ministers which acts as his cabinet and is responsible for national planning and budgetary matters.[75] Additionally, the president prepares and submits legislation to the legislative branch through the Council of Ministers.[76] The president is also empowered to execute treaties and contracts on behalf of the Iranian government and is obliged to sign legislation approved by the Islamic Consultative Assembly.[77]

Legislative power is exercised through the Islamic Consultative Assembly.[78] Members of the Assembly are elected to four year terms by universal suffrage.[79] The Assembly is competent to establish laws on all matters as long as such laws are not contrary to Islam or the constitution.[80] Most legislation is submitted to the Assembly by the Council of Ministers although bills sponsored by at least fifteen members may be introduced independent of the Council.[81] All legislation passed by the Assembly must be submitted to the Guardian Council to ensure its compatibility with Islamic teachings and the constitution.[82] All legisla-

68. *See id.* §§ 5, art. 60, 8, art. 107 and 9.1, art. 113.

69. *See id.* § 1, art. 5.

70. *See id.* § 8, art. 107. The qualifications for selection as leader are scholarship, justice, piety and "adequate capability for leadership." *Id.* § 8, art. 109.

71. *See id.* § 8, arts. 110(2),(6) and (8).

72. *See id.* § 8, arts. 110(3) and (4).

73. *See id.* § 9.1, art. 113.

74. *See id.* § 9.1, art. 114. In order to be eligible for election, a presidential candidate must possess Iranian origin and nationality, administrative capacity and resourcefulness, a good past record of accomplishments, trustworthiness, piety and belief in the fundamental principles of Islamic governance as manifested in Iran. *Id.* § 9.1, art. 115.

75. *See id.* §§ 9.1, art. 126 and 9.2, arts. 133-34.

76. *See id.* § 6.2, art. 74.

77. *See id.* § 9.1, arts. 123 and 125.

78. *See id.* § 5, art. 58.

79. *See id.*

80. *See id.* § 6, arts. 71-72.

81. *See id.* § 6, art. 74.

82. *See id.* § 6.2, art. 94. The Guardian Council consists of twelve members. Six of the Council members are lawyers selected by the Islamic Consultative Assembly from nominations submitted by the head of the judicial branch. These members determine the

tion approved by the Guardian Council is fully enforceable and must be submitted to the president for signature.[83] The Assembly also has the right to investigate the affairs of the country and must approve all international treaties, contracts and agreements.[84]

Judicial authority is constitutionally vested in the Supreme Court, the head of the judicial branch and the minister of justice.[85] The Supreme Court's primary responsibility is supervision of the lower courts.[86] The chief judicial officer of the Supreme Court is nominated by the head of the judicial branch for a period of five years in consultation with the Court's judges.[87] The head of the judicial branch is appointed to a five year term by the leader and is responsible for the appointment and dismissal of lower court judges.[88] The Minister of Justice is selected by the president from candidates proposed by the head of the judicial branch.[89] The Minister's primary responsibility is the coordination of relations between the executive, legislative and judicial branches.[90] The constitution guarantees the independence of the judiciary, due process, the right to counsel, the presumption of innocence in criminal cases and the right to a public trial before a jury.[91] In any event, all judicial decisions must conform with Islamic principles.[92]

The conflict created by the Iranian constitution between the offices of national religious leader and president has resulted in considerable political ferment.[93] Ayatollah Khamenei remains the national religious leader. A former student of Khomeini and president under his regime, Khamenei remains hostile to the United States and opposes to any resumption of dialogue between the countries. In recent speeches, Khamenei has castigated the United States for its "global arrogance"[94] and accused it of seeking to destabilize the Iranian government at the

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constitutionality of proposed legislation. The remaining six members of the Council are religious scholars selected by the leader to consider the conformity of all proposed legislation to Islamic principles. *Id.* § 6.2, art. 91.

83. *See id.* §§ 6.2, art. 94 and 9.1, art. 123.

84. *See id.* § 6.1, arts. 76-77.

85. *See id.* § 11, arts. 157, 160 and 161.

86. *See id.* § 11, art. 161.

87. *See id.* § 11, art. 162.

88. *See id.* § 11, arts. 157-58.

89. *See id.* § 11, art. 160.

90. *See id.*

91. *See id.* §§ 3, arts. 32, 35 and 11, arts. 156, 165 and 168.

92. *See id.* § 5, art. 61.

93. *See* John Rossant, *The Stakes are Huge as President Khatami Wages a Bitter Battle Against Hardline Mullahs for the Soul of Iran*, BUS. WK., Dec. 8, 1997, at 16, *available in* 1997 WL 14814621. *See also Iran: Pro-Khatami Backers Clash with Vigilantes*, DOW JONES INT'L NEWS SERV., Mar. 2, 1998.

94. *See Iran Opens Summit with a Vengeance: 'Poisonous Breath' of U.S. Threatens Gulf Security and Islamic Values, Khamenei Charges*, GLOBE & MAIL, Dec. 10, 1997, at A15.

behest of a "Zionist network" controlled by Israel.[95] According to Khamenei, such measures have only served to strengthen Iranian resolve to actively oppose American policies in the Middle East.[96] Khamenei is strongly supported by the speaker of the parliament, Ali Akbar Nateq-Nouri, and the head of the judicial branch, Ayatollah Mohammad Yazdi.[97] Khamenei also has strong support from most of Iran's major institutions such as the military, the media, the intelligence community and religious foundations which remain firmly under the control of religious conservatives.[98]

However, the grip of religious conservatives upon the reins of power in Iran have not gone unchallenged. In an unprecedented statement in December 1997, former Khomeini ally Ayatollah Hossein Ali Montazeri openly questioned the legitimacy of Khamenei's role in the government as national religious leader.[99] Of particular concern to Montazeri was Khamenei's paramount role in governmental affairs in the absence of popular election by the Iranian citizenry.[100] Montazeri's statement led to accusations of treason and a crackdown against his supporters by religious conservatives.[101]

A greater threat to the conservative's grip upon power was the selection of a religious moderate as president in Iran's recent elections. Moderate cleric Seyyed Mohammad Khatami, the former Minister of Culture and Islamic Guidance from 1982 until his ouster in 1992,[102] swept to an overwhelming victory in Iran's May 23, 1997 presidential election. Running on a platform of economic centralization and relaxation of the rigid Islamic social code,[103] Khatami easily defeated three

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95. *See* Afshin Valinejad, *Hardline Cleric Says U.S. is Intent on Destabilizing Iran*, ASSOC. PRESS, Jan. 2, 1998, *available in* 1998 WL 6635779. *See also* Afshin Valinejad, *Iran Cleric Opposes U.S. Ties: Ayatollah's Sermon Contrasts Sharply with Tone of Nation's President*, PEORIA J. STAR, Jan. 3, 1998, at A3, *available in* 1998 WL 5749472; *Iran's Khamenei Says U.S. Gov't Controlled by Zionists*, DOW JONES INT'L NEWS SERV., Dec. 24, 1997.

96. *See Khamenei Carps at Idea of Iran-U.S. Talks*, FLA. TIMES UNION, Jan. 17, 1998, *available in* 1998 WL 6180823

97. *See* Rossant, *supra* note 93, at 17.

98. *Id.*

99. *See* John Lancaster, *Iranian Cleric Disputes Ayatollah's Right to Rule*, WASH. POST, Dec. 23, 1997, at A10. Montazeri served as deputy religious leader and Khomeini's heir apparent until his resignation in 1989 in protest of the perceived despotic tendencies of the regime. *See* Rossant, *supra* note 93, at 17.

100. *See* Lancaster, *supra* note 99, at A10.

101. *See id. See also Iranian Leader Asserts His Authority to End Political Unrest*, AGENCE FR.-PRESSE, Nov. 27, 1997, *available in* 1997 WL 13442988.

102. Khatami is a hojatoleslam or middle-ranking cleric. Khatami was removed as minister by conservative clerics in 1992 for lifting strict state controls on entertainment such as the prohibition upon live concerts and women singing in public. *See President-Elect of Iran Not Your Typical Mullah*, TAMPA TRIB., May 25, 1997, *available in* 1997 WL 10788898. *See also* John Daniszewski, *Moderate Wins by a Landslide in Iran's Presidential Race*, PORTLAND OREGONIAN, May 24, 1997, *available in* 1997 WL 4175518.

103. *See* Anwar Faruqi, *Iran's Election Shaping Up as a Real Contest*, ASSOC. PRESS,

other candidates by capturing 20.7 million of the 29.7 million votes cast.[104] Khatami's chief rival, Nateq-Nouri, running on a platform of economic decentralization and strict enforcement of the Islamic social code,[105] was able to garner 7.2 million votes.[106] The ease and size of Khatami's victory constituted a shocking and firm rejection of the stifling rule of the conservative clerics.[107]

Khatami was inaugurated on August 3, 1997 and immediately began to steer a moderate course for the Iranian presidency.[108] Instructive in this regard was his selection of candidates for his twenty-two person cabinet. Included in the new president's selections was Kamal Kharrazi, Iran's ambassador to the United Nations, as the new foreign minister.[109] Kharrazi was educated in the United States and was instrumental in securing the release of foreign hostages by pro-Iranian militias in Lebanon in the early 1990s.[110] At the intelligence ministry, Khatami replaced Ali Fallahian, who had been linked to anti-Western attacks,

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Apr. 20, 1997, *available in* 1997 WL 4862793.

104. *See* John Lancaster, *Iranians Voted for New Ideas, Not a New System*, WASH. POST, May 26, 1997, at A1. *See also* John Lancaster, *Moderate Iranian Wins; Khatami Swamps Hardliner, Captures Presidency*, WASH. POST, May 25, 1997. Two-hundred thirty-eight candidates registered to run for the presidency including nine women. *See Iran Selects 4 Candidates for Election*, CHINA DAILY, May 9, 1997, *available in* 1997 WL 8259214. However, the Guardian Council certified only four candidates for inclusion on the ballot as recognized statesmen committed to the Islamic principles underlying the Iranian constitution. *See Council Sets Guidelines for Iranian Presidential Candidates*, ASSOC. PRESS, Apr. 28, 1997, *available in* 1997 WL 4863995. All women candidates were eliminated as the Iranian constitution does not permit women to run for the presidency. *Id.* Ninety percent of the 33 million eligible voters cast ballots in the general election. *See* Anwar Faruqi, *Moderate Cleric Wins Iranian Presidency: The New President's Supporters Hope He Can Restrain the Conservative Faction Within the Clergy*, FT. WORTH STAR TELEGRAM, May 25, 1997, *available in* 1997 WL 4843997. *See also Khatami Promises More Democracy*, AGENCE FR.-PRESSE, May 25, 1997, *available in* 1997 WL 2121502.. Men and women over the age of fifteen years are eligible to vote in Iran. *See Facts, Figures on Iran's Elections*, ASSOC. PRESS, May 22, 1997, *available in* 1997 WL 486 7865.

105. *See* Faruqi, *supra* note 103.

106. *See* Faruqi, *supra* note 104. The other two candidates, former intelligence minister Mohammad Mohammadi Reyshahri and deputy head of the judiciary Syed Reza Zavareie, garnered less than one million votes apiece. *Id.*

107. *See* Faruqi, *supra* note 104, at A1. *See also Iran's Khatami Proclaims New Era for Islamic Nation*, ASSOC. PRESS, May 26, 1997, *available in* 1997 WL 4844415. Iranian dissident Abdolkarim Soroush characterized Khatami's electoral victory as "a flood [against clergy rule] that has been released after years of building up." *Iran's Vote Sends Unusual Message for Political Islam*, ASSOC. PRESS, May 25, 1997, *available in* 1997 WL 2528506.

108. *Iran Swears in New President*, ASSOC. PRESS, Aug. 4, 1997, *available in* 1997 WL 2164293.

109. *Iran Set to Debate Cabinet: Leader's Picks Draw Ire of Hard-Liners*, BOSTON GLOBE, Aug. 13, 1997, at A2, *available in* 1997 WL 6265411. *See Iran's President Faces Hard-liner Opposition*, GLOBE & MAIL, Aug. 15, 1997, at A12.

110. *Iran's President Faces Hard-liner Oppostion, supra* note 109, at A12.

with the less ideological Qorbanali Dorri Najafabadi.[111] Most controversial of all, Khatami named Ayatollah Mohajerani as head of the Cultural and Islamic Guidance Ministry.[112] Mohajerani ignited a firestorm of criticism in 1991 when he called for the restoration of diplomatic relations with the United States.[113]

Under Khatami's leadership, Iran's dismal human rights record has improved slightly. Khatami advocates equal rights for women[114] and has appointed women to the judiciary as well as his cabinet.[115] Khatami has also called for the loosening of strict governmental controls on individual liberty including freedom of speech and the press.[116] Khatami's election improved the United Nations' most recent assessment of human rights in Iran which had noted slight improvements in its report completed immediately before the presidential election.[117]

Of perhaps greater concern to religious conservatives is Khatami's proposed resumption of dialogue with the United States. At the eighth summit of the Organization of the Islamic Conference, Khatami called for understanding of western civilization which he characterized as the preponderant culture of the late twentieth century.[118] Khatami also

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111. *Id.*

112. *Id. See Iranian President Loads Cabinet with Pragmatists, Moderates: Some U.S. Experts See Chance for Warmer Relations*, L.A. TIMES, Aug. 13, 1997, *available in* 1997 WL 2237614.

113. *See Iran Set to Debate Cabinet: Leader's Picks Draw Ire of Hard-Liners*, *supra* note 109, at A2.

114. *Iran Leader Backs Women's Rights*, COM. APPEAL, Dec. 1, 1997, at A2, *available in* 1997 WL 14521183. *See President Backs Women*, SACRAMENTO BEE, Dec. 1, 1997, at A13, *available in* 1997 WL 15807433.

115. *See Iran Appoints Women Judge, Its First Since '79*, SEATTLE POST INTELLIGENCE, Dec. 26, 1997, at A10, *available in* 1997 WL 15960953. *See also First Woman Appointed to Iranian Cabinet*, WASH. POST, Aug. 24, 1997, at A20. Appointed to the office of vice president for environmental protection, Masoumeh Ebekar is the first woman to serve in an Iranian cabinet position since the Islamic revolution.

116. *See* Faruqi, *supra* note 104, at A1. *See also* Carla Hall, *Iranians Are Going Against the Old System*, L.A. TIMES, Mar. 23, 1998, at B1, *available in* 1998 WL 2410998; *Iranians Go to Polls Today to Choose President: Race Pits Hard-line Cleric Against Moderate*, PATRIOT LEDGER, May 23, 1997, at 3, *available in* 1997 WL 8178738; *Journalists Criticize Senior Iranian Official in Rare Protest*, ASSOC. PRESS, Jan. 5, 1998, *available in* 1998 WL 6636160; *President Backs Women*, *supra* note 114, at A2.

117. *See U.N. Commission Censures Iran*, AGENCE FR.-PRESSE, Apr. 22, 1998, *available in* 1998 WL 2266925. Khatami's dedication to improving human rights protections has earned him the title of "Ayatollah Gorbachev" amongst some Iranians. *See* John Lancaster, *Khatami: Iran's 'Ayatollah Gorbachev'; Election Winner Schooled in Islamic Revolution, Western Culture*, WASH. POST, May 25, 1997, at A29.

118. *See* John Lancaster, *Iran's Top Leaders Differ on Relations with West; Clashing Views Air as Islamic Summit Opens*, WASH. POST, Dec. 10, 1997, at A1. By contrast, at the same summit meeting, Khamenei characterized western civilization as "directing everyone toward materialism, while money, gluttony, and carnal desires are made the greatest aspirations." *Excerpts of Speeches by Khamenei, Khatami*, ASSOC. PRESS, Dec. 9, 1997, *available in* 1997 WL 4895959.

called for "thoughtful dialogue" with the American people.[119] Although Khatami called only for dialogue amongst the American and Iranian peoples rather than their governments, his remarks suggested that it was a matter of when rather than if relations between the two governments would be restored.[120] The United States welcomed Khatami's calls for dialogue although it preferred public discussions between authorized governmental representatives.[121] Additionally, the United States called for positive action in support of Khatami's conciliatory statements such as discontinuation of Iranian support for terrorism and efforts to acquire weapons of mass destruction as well as its opposition to the Middle East peace process.[122]

President Khatami's overtures progressed further in televised remarks addressed to the American people on January 8, 1998. In an extraordinary interview, Khatami "declared his solidarity with the 'essence of American civilization'"[123] and expressed hope that Iran and the United States could eliminate the causes of the estrangement existing between the countries.[124] Furthermore, Khatami expressed regret for the "unorthodox" seizure of American hostages in 1979 which stemmed from excessive "revolutionary zeal" and American provocation.[125] However, Khatami stopped short of calling for diplomatic dialogue and only endorsed unofficial contacts between educators, writers, artists and tourists.[126] The Clinton Administration accepted Khatami's offer of un-

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119. *See* John Lancaster, *Khatami Seeks U.S. Dialogue; Iranian Leader Takes Conciliatory Tone, Praises American People*, WASH. POST, Dec. 15, 1997, at A1. *See also* Anwar Faruqi, *Iranian President Calls for Dialogue with Americans*, ASSOC. PRESS, Dec. 14, 1997, *available in* 1997 WL 4896721. By contrast, in his address to the summit, Khamenei characterized the United States as "the political designers of arrogance . . . breathing their poisonous breath to make our neighbors in the Persian Gulf fearful of Islamic Iran which holds the banner of unity and brotherhood." Anthony Shadid, *Despite Hope for Moderation, Iran's Leader Blasts West, Israel*, ASSOC. PRESS, Dec. 9, 1997, *available in* 1997 WL 4895949. Khatami has not referred to the United States as "the Great Satan" since he assumed office in August 1997. *See Iran President Seeks U.S. Dialogue*, COLUMBIAN, Dec. 15, 1997, *available in* 1997 WL 16400146.

120. *See Iranian Leader Opens Door*, CHI. SUN TIMES, Jan. 8, 1998, *available in* 1998 WL 5560892.

121. *See* Lancaster, *supra* note 119, at A1. *See also U.S. Warming to Dialogue*, SEATTLE TIMES, Dec. 10, 1997, *available in* 1997 WL 1650638.

122. *See Iran Gets Clinton's Attention: President Welcomes Call for Dialogue; Clinton Would Welcome Talks with Iran*, SALT LAKE TRIB., Dec. 16, 1997, at A1, *available in* 1997 WL 15241930. *See also Iran Says Clinton Statement May Signal Change in U.S. Position*, ASSOC. PRESS, May 31, 1997, *available in* 1997 WL 2528985.

123. *Iranian Leader Urges Exchanges with U.S.; Khatemi Expresses Regret for 1979 Hostage Taking, Suggests Negotiations*, WASH. POST, Jan. 8, 1998, at A1.

124. *See Journalists Criticize Senior Iranian Official in Rare Protest*, *supra* note 116.

125. *See Iran's Leader Backs Closer Ties to U.S.*, ASSOC. PRESS, Jan. 8, 1998, *available in* 1998 WL 6165601. *See also Iran's New President Extends Olive Branch*, SEATTLE POST INTELLIGENCER, Aug. 4, 1997, at A2, *available in* 1997 WL 3203372.

126. *See Iranian Leader Urges Exchanges with U.S.*, *supra* note 123, at A1; *see also Iran's Leader Backs Closer Ties to U.S.*, *supra* note 125; *Iranian Leader Opens Door*, *supra* note 120, at A12. By contrast, Ayatollah Khamenei branded the United States as an

official contacts[127] but also reiterated its call for government-to-government dialogue.[128] The United States also announced it would review its visa process for Iranians as a means of encouraging further dialogue between the countries.[129] Perhaps most importantly, Under-Secretary of State Stuart Eizenstat announced the creation of a committee to review the Clinton Administration's sanctions policies on Iran.[130]

Regardless of these recent hopeful developments, relations between

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enemy of Iran and Islam. *See Iranian Leaders Denounce U.S., Urge Closer Ties With Europe*, ASSOC. PRESS, Apr. 5, 1998, *available in* 1998 WL 6649257. *See also* John Lancaster, *Head Iranian Cleric Rejects Talks with U.S.*, WASH. POST, Jan. 17, 1998, at A18; *Iran Spritiual Leader Condemns U.S., Rejects Dialogue*, DOW JONES NEWS SERV., Jan. 16, 1998. Khamenei ruled out any resumption of dialogue with the United States. *Id. See also Ayatollah Rejects Proposal For Talks With U.S.*, ASSOC. PRESS, Jan. 17, 1998, *available in* 1998 WL 4115665. Khamenei also defended the seizure of the American Embassy and subsequent hostage crisis as necessary to eliminate American conspiracies to defeat the Islamic revolution. *See Iran Leader Condemns U.S.*, DOW JONES NEWS SERV., Jan. 16, 1998. Perhaps in response to pressure from conservative clerics, Khatami subsequently accused the United States of having "damaged [Iranian] freedom, independence, interests and glory." *U.S. Brushes Aside Critical Comments By Iran's President*, DOW JONES NEWS SERV., Jan. 20, 1998. The U.S. State Department chose to ignore these remarks and renewed its call for government-to-government dialogue. *Id.* For its part, Foreign Minister Kharrazi stated that Khatami's remarks did not constitute a repudiation of his previous positive statements and that Iran still seeks "relations [with the United States] based on détente and mutual interests." *Iranian Official Says Khatami Still Wants Détente with U.S.*, DOW JONES INT'L NEWS, Jan. 24, 1998. However, Kharrazi emphasized that the resumption of relations between the two countries is dependent upon "positive deeds and a change of behavior by the United States." *Iran Minister: "Positive Deeds" Needed For U.S. Opening*, ASSOC. PRESS, Jan. 31, 1998, *available in* 1998 WL 6639595. *See also Iranian Says the Ball is in U.S. Court*, WASH. POST, Feb. 25, 1998, at A20.

127. *See* Thomas W. Lippman, *More Signs of Thaw in Icy U.S.-Iran Relations*, WASH. POST, Mar. 27, 1998, at A28. *See also Clinton Backs More Contact with Iranians*, WASH. POST, Jan. 30, 1998, at A28; *Clinton Makes Holiday Overture to Iranian People*, ASSOC. PRESS, Jan. 29, 1998, *available in* 1998 WL 6639463; *U.S., Iran Move Cautiously Toward Better Relations*, DOW JONES NEWS SERV., Mar. 27, 1998; *With People-to-People Exchanges, U.S.-Iranian Ties Improving*, ASSOC. PRESS, Mar. 25, 1998, *available in* 1998 WL 6647772.

128. *See* Ben Barber, *Iranian Overture Is Met With Doubt, State Dept. Urges Government Dialogue*, WASH. TIMES, Jan. 9, 1998, at A11. *See also Mending Ties With U.S., Iranian President Calls For Dialogue*, ASSOC. PRESS, Jan. 7, 1998, *available in* 1998 WL 6179987; *U.S. Looking for Deeds To Back Up Conciliatory Words from Iran*, ASSOC. PRESS, Jan. 8, 1998, *available in* 1998 WL 7374756.

129. *See U.S. to Review Visa Process for Iranians*, ASSOC. PRESS, Jan. 12, 1998, *available in* 1998 WL 2461535.

130. *See* David S. Cloud, *U.S. Uncertain How To Respond to Khatami's Overture*, PITTSBURGH POST-GAZETTE, Jan. 10, 1998, *available in* 1998 WL 5224974. Citing the moderate tone of President Khatami's remarks, the European Union called upon the United States to abandon its unilateral sanctions policy with regard to Iran. *See EU To Press For Less Rigid U.S. Stance On Iran*, ASSOC. PRESS, Jan. 12, 1998, *available in* 1998 WL 6637201.

the United States and Iran have been confrontational since the Islamic revolution. On November 4, 1979, Islamic militants occupied the U.S. embassy in Tehran and held fifty-two Americans hostage until January 20, 1981.[131] Ten days after the seizure of the Embassy, President Jimmy Carter declared a national emergency with respect to Iran which has been renewed every year since 1979.[132] On April 7, 1980, the United States broke diplomatic relations with Iran, and, on April 24, 1981, the Swiss government assumed representation of U.S. interests in Iran.[133] Iranian interests in the United States are represented by the Pakistani government.[134]

U.S.-Iranian relations have also been strained as a result of other events. Iran remains on the list of countries which, according to the United States, sponsor international terrorism.[135] Iran was first placed on the list of state sponsors of international terrorism on January 19, 1984 after the Reagan administration determined the existence of Iranian complicity in the October 1983 bombing of the Marine barracks in Beirut, Lebanon.[136] Iran has also been implicated in the bombing of Pan Am Flight 103 in December 1988,[137] and the attacks upon the U.S. military housing complex in Dhahran, Saudi Arabia in June 1996[138] and

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131. IRAN: STATE DEP'T NOTES, *supra* note 40, at 8.

132. *See* Exec. Order No. 12,170, 3 C.F.R. 457 (1980). *See also* H.R. REP. NO. 104-523(I), at 9 (1996).

133. *See* IRAN: STATE DEP'T NOTES, *supra* note 40, at 8-9.

134. *See id.* at 9.

135. *See* U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, TERRORISM 1 (1996) (visited Oct. 18, 1998) <http://www.treas.gov/ofac/t11ter.pdf> [hereinafter TERRORISM]. The list is complied pursuant to Section 2405(o) of the Export Administration Act of 1979. Section 2405(o) provides, in part, that "[t]he Secretary [of Commerce] shall establish and maintain . . . a list of any goods or technology subject to export controls under this section, and the countries to which such controls apply." Export Administration Act of 1979, 50 U.S.C. app. § 2405(o) (1998). The countries currently designated as supporting international terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria. *See* TERRORISM, *supra*, at 1.

136. *See* H.R. REP. NO. 104-523(I), at 9. Placement upon this list disqualified Iran from receiving U.S. foreign aid, goods on the U.S. munitions list, Export-Import Bank credits and U.S. support for foreign loans and required strict licensing requirements for any U.S. exports of controlled goods or technology. *See id.* The bombing of the Marine barracks resulted in the death of 298 members of the American/French multinational force in Lebanon.

137. *See Khomeini Ordered Bombing Over Lockerbie, Report Says,, supra* note 17. According to the German magazine Der Spiegel, Abolghassem Mesbahi, the co-founder of the Iranian intelligence service, informed the German Federal Criminal Police Office and the Frankfurt prosecutor's office that Khomeini ordered the bombing as retaliation for the downing of an Iranian passenger jet over the Strait of Hormuz by a U.S. warship in July 1988. *See id.* The explosion of Flight 103 over Lockerbie, Scotland on December 21, 1988 killed all 259 people on board and 11 on the ground. *See id.*

138. *See Suspects in Saudi Bombing Belong To Iran-Inspired Group,* ASSOC. PRESS, Nov. 2, 1996, *available in* 1996 WL 4447279. The alleged mastermind of the bombing, Ahmed Ibrahim Ahmad Mughassil, is believed to have fled to Iran after the attack. *See Iran Denied Saturday It Was Harboring Bombing Suspect,* ASSOC. PRESS, Mar. 29, 1997, *available in* 1997 WL 4859695. Iran was directly implicated by Hani Abdel Rahim al-

foreign tourists in Egypt in November 1997.[139] Additionally, Iran is alleged to be the principal supplier of armaments, money and logistical support to terrorist groups such as Hizballah, Hamas, the Palestinian Islamic Jihad and the Popular Front for the Liberation of Palestine.[140] Iran is further believed to have supported attempts to destabilize the governments of its Arab neighbors including a failed 1981 coup d'état in Bahrain and the attempted assassination of Egyptian President Hosni Mubarak in Addis Ababa, Ethiopia in June 1995.[141] Finally, Iran has been accused of attacks upon Iranian dissidents abroad including the assassination of Iranian Kurdish leader Sadiq Sarafkindi in Berlin,

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Sayegh who allegedly conducted surveillance on the target, drove the bomb to the housing complex and assisted in the bombers' escape. *See* Pierre Thomas, *Saudi Suspect May Cooperate in Bomb Probe,* WASH. POST, June 17, 1997, at A10. *See also Canada To Deport Suspect In Saudi Terror Blast,* SAN DIEGO UNION-TRIB., May 6, 1997, at A18, *available in* 1997 WL 3131680. However, despite initial optimism that responsibility for the bombing could be quickly determined, as of the time of the preparation of this article, attribution of the attack to Iran remains unresolved. *See Saudis Still Stymie FBI,* WASH. POST, May 1, 1997, at A26. Iran has denied any involvement in the attack. *See Iranian Minister: U.S. Can't 'Divide and Rule,'* WASH. POST, Oct. 5, 1997, at C4. The June 25, 1996 bombing resulted in the death of 19 U.S. military personnel. *See* Howard Schneider & Pierre Thomas, *Canada Ties Hezbollah to Saudi Attack,* WASH. POST, Mar. 28, 1997, at A1.

139. *See Report: U.S. Envoy Says Iran Behind Luxor Massacre,* ASSOC. PRESS, Dec. 24, 1997, *available in* 1997 WL 4898297. Edward Walker, the U.S. ambassador to Israel, accused Iran of responsibility for the November 17, 1997 attack which resulted in the death of 58 tourists in Luxor, Egypt. *Id.*

140. *See* IRAN: STATE DEP'T NOTES, *supra* note 40, at 8. *See also* John Lancaster, *Iran Has Strong Links to Anti-West Terror,* WASH. POST, Nov. 1, 1996, at A28; *Iranian Arms Shipments to Allies Reported On Rise,* SACRAMENTO BEE, Dec. 13, 1996, at A25, *available in* 1996 WL 14032467. Iran claims only to provide humanitarian support to such groups. *See Iranian Minister: U.S. Can't 'Divide and Rule,' supra* note 138, at C4. Iran also joined in the statement issued at the conclusion of the eighth summit of the Organization of the Islamic Conference in December 1997 condemning terrorism and denying asylum to suspected terrorists. *See* Chetwynd, *supra* note 35. *See also Conferees Lash Out At Terrorists Extremists,* ROCKY MTN. NEWS, Dec. 10, 1997, at 52A, *available in* 1997 WL 14975038. Khatami reiterated Iran's condemnation of terrorism in his address to the American people on January 8, 1998. *See Iran's Leader Backs Closer Ties to U.S, supra* note 125. *See also Mending Ties With U.S. Iranian President Calls For Dialogues, supra* note 128. However, it bears noting that Iran excludes from its definition of terrorists those groups "supporting peoples who fight for the liberation of their land" such as the Palestinians. *Iranian Leader Urges Exchanges with U.S.; Khatemi Expresses Regret for 1979 Hostage Taking, Suggests Negotiations, supra* note 123, at A1. Additionally, the U.S. Department of State identified Iran as the most active state sponsor of terrorism in the world in its annual report on international terrorism in 1997. *See* Stanley Meisler, *Iran Top Terrorist Nation, U.S. Says,* SACRAMENTO BEE, May 1, 1998, at A17, *available in* 1998 WL 8820737. Nevertheless, Iran's statements condemning acts of international terrorism led Central Intelligence Agency Director George J. Tenet to recently conclude that the Khatami administration is "sincerely lobbying for an end to government support of terrorism." R. Jeffrey Smith, *Khatami Wants to End Terrorism, Officials Say,* WASH. POST, May 5, 1998, at A9.

141. *See* IRAN: STATE DEP'T NOTES, *supra* note 40, at 8. *See also* Lancaster, *supra* note 140, at A28.

Germany in September 1992.[142]

Relations have also been strained as a result of Iranian attempts to acquire weapons of mass destruction. Iran is alleged to be actively pursuing development of nuclear weapons primarily with equipment and technology supplied by the Peoples' Republic of China.[143] Iran's first nuclear power plant, located in Bushehr in southern Iran and constructed with Russian assistance, is nearing completion.[144] Iran is also alleged to have purchased chemical weapons technology and materials from China.[145] Finally, Iran has purchased billions of dollars of conventional

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142. *See Iranian Students Clash with Troops,* ASSOC. PRESS, Apr. 14, 1997, *available in* 1997 WL 6519887. The U.S. State Department estimates that Iran is responsible for more than fifty murders of political dissidents overseas since 1979. *See State Department Again Lists Iran as Chief Terrorism Sponsor,* WASH. POST, May 1, 1997, at A26. A German court convicted four men of the assassination of Sarafkindi and specifically found that the Iranian leadership ordered the murder. *See Court Says Iran's Leaders Ordered Killings,* ASSOC. PRESS, Apr. 10, 1997, *available in* 1997 WL 4861347. *See also German Court: Tehran Ordered Exile Killings,* WASH. POST, Apr. 11, 1997, at A1.

143. *See* Edward J. Markey, et al., *China and Nuclear Trafficking,* WASH. POST, Oct. 29, 1997, at A23. *See also Leaders Reach Accord To Clear U.S. Reactors Sales,* ASSOC. PRESS, Oct. 29, 1997, *available in* 1997 WL 2558503. Chinese President Jiang Zemin pledged to terminate assistance to Iran's nuclear program in October 1997. *See* R. Jeffrey Smith, *China's Pledge to End Iran Nuclear Aid Yields U.S. Help,* WASH. POST, Oct. 30, 1997, at A15. *See also China Ready to End NuHelp for Iran,* ASSOC. PRESS, Oct. 25, 1997, *available in* 1997 WL 7129734. Iran also reportedly attempted to purchase nuclear technology from South Africa and Kazakhstan. *See Report: Iran Trying to Buy South African Nuclear Technology,* ASSOC. PRESS, Nov. 24, 1997, *available in* 1997 WL 4893813. *See also Pentagon: Iran Has No Soviet Nukes,* ASSOC. PRESS, Apr. 9, 1998, *available in* 1998 WL 7184550; *Pentagon: No Evidence To Support Report Iran Got Soviet Nukes,* ASSOC. PRESS, Apr. 9, 1998, *available in* 1997 WL 6650352; *Report: Iran Has Nuclear Warheads,* ASSOC. PRESS, Apr. 9, 1998.

144. *See Iran to Begin Operating First Nuclear Power Plant,* ASSOC. PRESS, July 7, 1997, *available in* 1997 WL 4873948. *See also Ukraine Vows Not to Sell Turbines For Iranian Reactor,* ASSOC. PRESS, Apr. 15, 1997, *available in* 1997 WL 4862194. The contract for the construction of the nuclear power plant is estimated to be worth $800 million to Russia. *See Iran May Purchase Russia Missles,* ASSOC. PRESS, Feb. 25, 1998, *available in* 1997 WL 8151007. *See also Ukraine Bows to U.S. Pressure,* WASH. POST, Mar. 7, 1998, at A.15. The United States opposed construction of the plant, maintaining that training and technology supplied for it could be used to build nuclear weapons. *Iran to Begin Operating First Nuclear Power Plant, supra. See also U.S. Still Opposed To Russian Role In Iran Project,* ASSOC. PRESS, Feb. 23, 1998, *available in* 1997 WL 6642670; *U.S. Wins Ukrainian Pledge On Nuclear Export Controls,* DOW JONES NEWS SERV., Mar. 6, 1998. Iran has denied allegations that is developing nuclear weapons, pointing to its status as a signatory to the Nuclear Non-Proliferation Treaty. *See Iranian Leader Urges Exchanges with U.S., supra* note 123, at A1. *See also* Murphy, *supra* note 1, at C1.; *U.S. Can't 'Divide and Rule,' supra* note 138, at C4. However, John Holum, the director of the U.S. Arms Control and Disarmament Agency, has estimated that Iran will be able to deploy nuclear weapons by 2007. *See Iran Running Into Difficulties In Push For Nuclear Capability,* ASSOC. PRESS, May 4, 1997, *available in* 1997 WL 4864763.

145. *See* Thomas W. Lippman, *U.S. Imposes Sanctions On China Firms,* WASH. POST, May 23, 1997, at A1. *See also U.S. To Punish Chinese For Chemical Weapons Shipments to Iran,* ASSOC. PRESS, May 22, 1997, *available in* 1997 WL 4867904. Iran has denied that it is attempting to produce chemical weapons and has ratified the Chemical Weapons Convention. *See Iran Signs Pact On Nerve Gas,* ASSOC. PRESS, Nov. 10, 1997, *available in*

weapons including anti-ship cruise missiles from China[146] and missiles, missile technology, tanks, helicopters and submarines from Russia.[147]

Finally, Iran's hostility to the Middle East peace process has thwarted improvement in its relations with the United States. At the recent summit of the Organization of the Islamic Conference, Khamenei derided the Middle East peace process as "unjust, arrogant, contemptuous and illogical."[148] These sentiments were echoed by Foreign Minister Kharrazi who condemned the peace process for its purported failure to adequately address issues concerning Palestinian self-determination, repatriation of refugees and liberation of occupied territories.[149] However, Khatami recently indicated that, although he believes that peace in the Middle East is not attainable without adequately addressing the rights and aspirations of the Palestinians, Iran would not interfere in the peace process and would "leave the Palestinians to decide their fate."[150] U.S. foreign policy analysts have chosen to focus on Khatami's

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1997 WL 8406504.

146. *See* Thomas W. Lippman, *U.S. Confirms China Missile Sale to Iran,* WASH. POST, May 31, 1997, at A15. Chinese President Jiang Zemin pledged to discontinue sales of such missiles to Iran in October 1997. *See China Promises To Halt Missile Sales To Iran,* ASSOC. PRESS., Oct. 18, 1997, *available in* 1997 WL 2556113. China reaffirmed this pledge in January 1998. *See Cohen Says China Hardens Promise To End Missile Sales To Iran,* ASSOC. PRESS, Jan. 20, 1998, *available in* 1997 WL 6637990. *See also Cohen Warns China On Iranian Threat to Gulf Shipping,* ASSOC. PRESS, Jan. 19, 1998, *available in* 1997 WL 7377515.

147. Russia reportedly sold Iran the technology necessary to produce SS-4 missiles which have a range of 1250 miles and carry a standard warhead equivalent to 3000 pounds of dynamite. *See Russia Government Aids Iran In Missile Manufacture,* DOW JONES TELERATE ENERGY SERV., Aug. 25, 1997. *See also Moscow Has Received A Diplomatic Warning,* ASSOC. PRESS, Feb. 12, 1997, *available in* 1997 WL 2499834. Russia also reportedly transferred technology to Iran to permit it to develop a smaller liquid-fuel missile with a range of eight hundred miles and a payload of 1550 pounds. *See Iran Said to be Building Missile,* ASSOC. PRESS, Jan. 7, 1998, *available in* 1997 WL 6636433. *See also Russia Helping Iran Get Missile To Hit Israel,* DOW JONES NEWS SERV., Sept. 21, 1997; *Russia Security Service: Iran Failed To Get Missile Know-How,* DOW JONES NEWS SERV., Oct. 2, 1997. Russia agreed to restrict the transfer of ballistic missile technology to Iran in January 1998. *See U.S. Keeps After Russia To Halt Flow Of Missile Technology to Iran,* WASH. POST, Jan. 18, 1998, at A9. *See also U.S., Russia to Step Up Efforts Against Iran Missile Program,* DOW JONES COMMODITIES SERV., Jan. 17, 1998. Iran has also purchased three submarines, tanks, helicopters and hundreds of anti-aircraft missiles from Russia in recent years. *See Russia Arms Merchants Selling Missiles To Iran,* ASSOC. PRESS, Apr. 16, 1997, *available in* 1997 WL 2517553.

148. Lancaster, *supra* note 118, at A1. *See also* Anton LaGuardia, *Iran Shows Deep Splits over the West at Islamic Summit,* DAILY TELEGRAPH (LONDON), Dec. 10, 1997, at 13, *available in* 1997 WL 2357745.

149. *See Iranian Minister: U.S. Can't 'Divide and Rule,' supra* note 138, at C4.

150. *Iran Pres.-Elect Policy Change, 'No Sign Of U.S. Change,'* DOW JONES NEWS SERV., May 27, 1997. *See also Iranian President Takes Plea For Rapprochement To American Public,* ASSOC. PRESS, Jan. 7, 1998, *available in* 1997 WL 6636549; *Iran's Leader Backs Closer Ties to U.S, supra* note 125; *Mending Ties With U.S., Iranian President Calls For Dialogue, supra* note 128.

conciliatory remarks rather than Khamenei's inflammatory statements and have characterized such remarks as "a nuanced change in a positive direction."[151]

In response to these events and perceived Iranian intransigence, the United States imposed numerous economic sanctions upon Iran prior to the enactment of ILSA. As previously noted, President Jimmy Carter declared a national emergency with respect to Iran pursuant to IEEPA on November 14, 1979.[152] As a result of President Carter's Order, approximately $12 billion in Iranian government bank deposits, gold and other properties in the United States were blocked, including $5.6 billion in deposits and securities held by overseas branches of U.S. banks.[153] The assets freeze was subsequently expanded to a full trade embargo, which remained in effect until the signing of the Algiers Accords on January 19, 1981.[154] Pursuant to the Accords, most Iranian assets in the United States were freed from future blockage, the trade embargo was rescinded[155] and attachments that U.S. persons had secured against Iranian assets in the United States were canceled in order that said assets could be returned to Iran.[156] Claims of U.S. nationals against Iran or Iranian entities for products shipped or services rendered prior to the imposition of the embargo and for uncompensated

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151. *Washington Has Muted Praise For Iran Leader On Mideast Peace,* DOW JONES INT'L NEWS SERV., Dec. 17, 1997. The cited characterization of Khatami's remarks was that of deputy State Department spokesman James Foley. *See also U.S. Encouraged by Iran's Overture,* ASSOC. PRESS, Feb. 2, 1998, *available in* 1997 WL 7382079.

152. *See* Exec. Order No. 12,170, *supra* note 132. Sections 1702(a)(1)(A) and (B) of IEEPA provide as follows:

> At the times and to the extent specified in section 1701 of this title [unusual and extraordinary threats to the national security, foreign policy or economy of the United States], the President may . . . investigate, regulate or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, the importing or exporting of currency or securities; and investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

IEEPA, 50 U.S.C. § 1702(a)(1)(A)-(B) (1994).

153. *See* U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, IRAN: WHAT YOU NEED TO KNOW ABOUT U.S. ECONOMIC SANCTIONS 3 (1998) (visited Oct. 18, 1998) <http://www.treas.gov/ofac/t11iran.pdf> [hereinafter IRAN: WHAT YOU NEED TO KNOW].

154. *See* Exec. Order No. 12,205, 3 C.F.R. 248 (1981) *as amended by* Exec. Order No. 12,211, 3 C.F.R. 253 (1981).

155. *See* Exec. Order No. 12,282, 3 C.F.R. 113 (1982).

156. *See* Exec. Order No. 12,276, 3 C.F.R. 104 (1982). *See also* Exec. Order No. 12,277, 3 C.F.R. 105 (1982); Exec. Order No. 12,278, 3 C.F.R. 107 (1982); Exec. Order No. 12,279, 3 C.F.R. 109 (1982); Exec. Order No. 12,280, 3 C.F.R. 110 (1982); Exec. Order No. 12,281, 3 C.F.R. 112 (1982).

expropriation of property within Iran were to be resolved in the Iran-United States Claims Tribunal established pursuant to the Accords.[157]

Economic sanctions upon Iran were re-imposed by the Reagan Administration. As a result of Iran's continued sponsorship of terrorist groups, on October 29, 1987, President Ronald Reagan issued Executive Order 12,613 imposing an import embargo on Iranian-origin goods and services.[158] This Order prohibited the importation of Iranian-origin goods and services either directly or through third countries.[159] Furthermore, U.S. persons were prohibited from providing financing for prohibited import transactions[160] and engaging in any transactions related to goods or services of Iranian origin.[161]

Further economic sanctions were imposed by the Clinton Administration. In response to Conoco, Inc.'s execution of a $550 million contract to develop Iran's offshore Sirri A and E oil and gas fields, President Clinton issued Executive Order 12,957 on March 15, 1995.[162] This Order declared a national emergency with respect to Iran pursuant to IEEPA[163] and prohibited the financing, management or supervision by U.S. persons of the development of Iranian petroleum resources.[164] Conoco was thereby forced to abrogate its development contract with Iran.[165]

The Clinton Administration imposed tighter restrictions upon Iran two months later after determining that Iran was persisting in its support of international terrorism and attempts to acquire weapons of mass destruction and presented a threat to the continuation of the Middle East peace process. As a result, President Clinton issued Executive

157. *See* Exec. Order No. 12,283, 3 C.F.R. 114 (1982). *See also* Exec. Order No. 12,294, 3 C.F.R. 139 (1982). Thirty-four of the 3,952 cases filed with the Iran-United States Claims Tribunal remain pending as of the time of preparation of this article. *See Iran-Money Claims Against U.S. Still Unresolved,* PERISCOPE-DAILY DEF. NEWS CAPSULES, Apr. 20, 1998, *available in* 1998 WL 8152041.

158. *See* Exec. Order No. 12,613, 3 C.F.R. 256 (1988). *See also* Iranian Transactions Regulations, 31 C.F.R. §§ 560.101-807 (1997). The statutory basis for President Reagan's Order was Section 505 of the International Security and Development Cooperation Act of 1985 which provides, in part, that "[t]he President may ban the importation into the United States of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations." International Security and Development Cooperation Act, 22 U.S.C. § 2349aa-9(a) (1994).

159. *See* Exec. Order No. 12,613, *supra* note 158, § 1. *See also* Iranian Transactions Regulations, *supra* note 158, § 560.201. Materials utilized in news publications and petroleum products refined from Iranian crude oil in a third country were exempted from the Order's import prohibition. *See* Exec. Order, *supra* note 158, § 2(a)-(b).

160. *See* Iranian Transactions Regulations, *supra* note 158, § 560.201.

161. *See id.* § 560.206.

162. *See* Exec. Order No. 12,957, *supra* note 19.

163. *See* IEEPA, 50 U.S.C. § 1703(c). *See also* IRAN: WHAT YOU NEED TO KNOW, *supra* note 153, at 1.

164. *See* Exec. Order No. 12,957, *supra* note 19, § 1. *See also* Iranian Transactions Regulations, *supra* note 158, §§ 560.206, 209(a)(1) and (b)(1).

165. *See* H.R. REP. NO. 104-523(I) at 9 (1996).

Order 12,959 on May 6, 1995.[166] This Order prohibited the export of goods and services to Iran[167] as well as continuing the prohibition upon the import of goods and services of Iranian origin.[168] U.S. persons, including foreign branches of U.S. banks and trading companies, were also prohibited from engaging in any transactions, including those involving purchases, sales, transportation, financing or brokering, related to goods or services of Iranian origin.[169] New investments by U.S. persons in Iran or in property owned or controlled by the Government of Iran were also prohibited.[170] Additionally, the Order prohibited U.S. banks, including foreign branches, from servicing accounts of the Iranian government, including banks owned or controlled by the government or persons in Iran.[171] Finally, the Executive Order also closed the

166. *See* Exec. Order No. 12,959, 3 C.F.R. 356 (1995).

167. *See id.* § 1(b). *See also* Iranian Transactions Regulations, *supra* note 158, § 560.204. Excepted from this prohibition were feed grains, rice, wheat, cotton, peanuts, tobacco, dairy products and oilseeds provided that the underlying contracts for their exportation to Iran were in existence prior to May 7, 1995 and delivery occurred prior to February 2, 1996. *See* Iranian Transactions Regulations, *supra* note 158, § 560.520(a)-(c). Additionally, gifts valued at less than one hundred dollars, donations of articles intended to alleviate human suffering and informational materials were excepted from the export prohibition. *See id.* §§ 560. 506, 210(b), 210(c) and 523. Services provided by nonresident U.S. persons outside of the United States were also excepted from the export ban. *See id.* § 560.410(d). However, services provided by a foreign branch of a U.S.-incorporated firm were deemed to be exported from the corporation's home office in the United States. *See id.* § 560.410(a)(3).

168. *See* Exec. Order No. 12,959, *supra* note 166, § 1(a). *See also* Iranian Transactions Regulations, *supra* note 158, § 560.201.

169. *See* Exec. Order No. 12,959, *supra* note 166, § 1(f). *See also* Iranian Transactions Regulations, *supra* note 158, § 560.206. These prohibitions also applied to transactions by U.S. persons in locations outside of the United States with respect to goods or services which the U.S. person knew, or had reason to know, were of Iranian origin or controlled by the government of Iran. *See* Iranian Transactions Regulations, *supra* note 158, § 560.411(a)-(b). However, U.S. persons could engage in transactions in third countries necessary to sell, store or maintain goods located in a third country which were legally acquired by the U.S. person prior to the issuance of the Order on the condition that the transactions did not result in an importation into the United States. *See id.* § 560.518(b)(1)-(2).

170. *See* Exec. Order No. 12,959, *supra* note 166, § 1(e). *See also* Iranian Transactions Regulations, *supra* note 158, § 560.207. Included within this prohibition were commitments of funds or other assets, loans and extensions of credit. *See* Iranian Transactions Regulations, *supra* note 158, §§ 560.316 (a)-(b) and 560.317. Letters of credit and other financing arrangements with respect to trade contracts in force and effect as of May 6, 1995 were excepted from this prohibition provided that the transactions contemplated therein were completed prior to June 6, 1995. *See id.* § 560.210(e). However, standby letters of credit which served as security for services rendered after June 6, 1995 could not be renewed nor payment made after that date without the authorization of the Department of Treasury, Office of Foreign Assets Control. *See id.*

171. *See* Iranian Transactions Regulations, *supra* note 158, § 560.517(a). However, U.S. banks were authorized to pay interest, deduct reasonable and customary service charges and process transfers related to exempt transactions. *See id.* § 560.517(a)(1)-(2). U.S. banks could also handle so-called "u-turn" transactions which were defined as transactions to cover payments involving Iran that were by order of a third country bank for payment to another third country bank provided they did not directly credit or debit an

loophole by which foreign affiliates of U.S. oil companies purchased approximately twenty-five percent of Iran's oil exports for overseas trade.[172]

Under the Shah's regime, Iran's economy rapidly industrialized and experienced high rates of growth.[173] However, Iran's post-revolutionary economy is under the strict control of the government. The Iranian Constitution requires the creation and implementation of "a correct and just economic system in accordance with Islamic criteria in order to create welfare, eliminate poverty and abolish all forms of deprivation with respect to food, housing, work, health care and the provision of social insurance."[174] In order to achieve these goals, the Iranian Constitution creates private and cooperative economic sectors in the fields of agriculture, small industry, trade and services.[175] Additionally, despite its recognition of private property rights,[176] the Constitution provides for state ownership of all economic sectors deemed vital to state security.[177] As a result, Iran annulled all pre-revolution contracts in the oil, gas and petrochemicals industries and placed these industries under state supervision.[178] The Iranian government also nationalized the banking and insurance industries as well as all enterprises having more than one thousand employees.[179]

The Iranian economy which emerged from the revolution and the eight year war with Iraq suffered from several serious problems.[180] Despite its high literacy rate,[181] the population is plagued by high levels of

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Iranian account. *See id.* § 560.516(a)(1). U.S. banks were also permitted to handle non-commercial family remittances involving Iran provided that the transfers were routed to or from non-U.S. non-Iranian offshore banks. *See id.* § 560.516(a)(4).

172. *See* Exec. Order No. 12,959, *supra* note 166, § 5. *See also* Iranian Transactions Regulations, *supra* note 158, at § 560.513.

173. *See* IRAN: STATE DEP'T NOTES, *supra* note 40, at 6.

174. IRAN CONST., § 1, art. 3.

175. *See id.* § 4, art. 44.

176. *See id.* § 4, art. 47.

177. *See id.* Included in these designated economic sectors are foreign trade, power generation, radio, television, telegraph and telephone services and transportation. *See id.*

178. *See Oil and Gas*, at 1 (visited Sept. 20, 1998) <http://www.salamiran.org/iraninfo/state/government/energy/oilgas/html>.

179. *See Iran Economic Overview* 1, (visited Sept. 20, 1998) <http://www.salamiran.org/iraninfo/economy/overview/html>.

180. *See An Air of Optimism in Iran*, WASH. POST, Dec. 15, 1997, at A1. *See also* IRAN: STATE DEP'T NOTES, *supra* note 40, at 6. The Iran-Iraq war commenced in September 1980 with Iraq's invasion of Iran and ended with the implementation of a cease-fire in August 1988.

181. An estimated 79.3 percent of Iran's 62.4 million citizens are literate. *See Iran's Key Economic Indicators* 1, (visited Sept. 20, 1998) <http://www.salamiran.org/iraninfo/economy/trends/key.html>. *See also* U.S. ENERGY INFORMATION ADMINISTRATION, IRAN REPORT (April 1997) <http://www.eia.doe.gov/emu/cabs/iran.html> (on file with author) [hereinafter IRAN: EIA REPORT].

unemployment estimated at thirty to forty percent.[182] Estimates regarding the rate of inflation range from twenty-four percent to thirty-five percent.[183] These deficiencies, when combined with the weakened state of the economy, have resulted in more than twenty billion dollars of external foreign debt.[184]

Iran's largest economic sector and source of foreign revenue are the oil, gas and petrochemicals industries. Iran is the second largest oil producer in the Organization of Petroleum Exporting Countries (OPEC) and accounts for approximately five percent of global oil output.[185] Iran's oil reserves account for nine percent of global reserves[186] and are the third largest in the world.[187] Although production of oil is less than seventy percent of its former total during the Shah's regime,[188] Iran still produces 3.76 million barrels of oil per day, of which 3.65 million barrels per day are crude oil.[189] Iran's onshore fields produce approximately 3.2 million barrels per day[190] while its offshore fields produce 550,000

182. *See* Peter W. Rodman, *Dialogue with Iran?*, WASH. POST, Dec. 24, 1997, at A13. *See also* IRAN: STATE DEP'T NOTES, *supra* note 40, at 6.

183. *See Khatami Promises More Democracy*, *supra* note 104. *See also* Faruqi, *supra* note 104. Recent estimates by the Iranian Government place the annual rate of inflation at twenty-five percent. *See Iran's Key Economic Indicators*, *supra* note 181, at 1. However, the U.S. Energy Information Administration estimated the annual rate of inflation to be 35.6 percent for fiscal year 1996. *See* IRAN: EIA REPORT, *supra* note 181, at 1.

184. Iran's total external foreign debt is estimated at $20.3 billion. *See* Iran: EIA Report, *supra* note 181, at 1. In March 1998, the Iranian Central Bank placed Iran's foreign debt at $16.8 billion. *See Khatami: Iran Bracing For Lower Revenues From Tumbling Oil Prices*, ASSOC. PRESS, Mar. 15, 1998, *available in* 1998 WL 6645526. In late 1996, Iran rescheduled ten billion dollars of this debt which eased its repayment schedule estimated at in excess of four billion dollars annually. *See id.*

185. *See* IRAN: EIA REPORT, *supra* note 181, at 1 and 4. OPEC consists of Iran, Algeria, Indonesia, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates and Venezuela. *See Iran Hopes to Hold Back Increase in OPEC Oil-Production Quota*, DOW JONES ONLINE NEWS, Nov. 27, 1997.

186. *See* IRAN: EIA REPORT, *supra* note 181, at 1, 4. Iran's proven oil reserves are 88 billion barrels. *See id.* Proven and possible reserves total 140 billion barrels. *See id.* at 4. Most of Iran's reserves are located in onshore fields in the Khuzestan region and beneath the Persian Gulf. *See id.*

187. *See* IRAN: STATE DEP'T NOTES, *supra* note 40, at 3.

188. *See Diplomacy with Iran*, WASH. POST, Apr. 7, 1997, at A16. Iran's crude oil production capacity in the mid-1970s was in excess of 7 million barrels per day. *See* IRAN: EIA REPORT, *supra* note 181, at 5.

189. *See* IRAN: EIA REPORT, *supra* note 181, at 5. Iran's OPEC crude oil production quota for the first half of 1997 was 3.6 million barrels per day. *Id.* This quota was increased to 3.942 million barrels per day for the first half of 1998. *See OPEC Dec Output-3: Table Of Output Estimates*, DOW JONES ENERGY SERV., Jan. 9, 1998. Iran's present sustainable production capacity is 3.9 million barrels per day. *See* IRAN: EIA REPORT, *supra* note 181, at 5. The Iranian Government has forecast that crude oil production will grow by 3.7 percent annually. *See Oil and Gas*, *supra* note 178, at 1. However, industry observers estimate Iran's sustainable production capacity will not be able to rise above four million barrels per day. *See* IRAN: EIA REPORT, *supra* note 181, at 5. Current daily world output of oil is 70 million barrels. *See* Greg Myre, *Companies Scramble In New Rush For Oil In Caspian Sea*, ASSOC. PRESS, Oct. 13, 1997, *available in* 1997 WL 14397544.

190. *See* IRAN: EIA REPORT, *supra* note 181, at 5. Approximately 2 million barrels per

barrels per day.[191] Iran has the capacity of processing 1.2 million barrels per day through its eight operational refineries.[192] In addition, Iran exports 2.6 million barrels of oil per day.[193] Iranian oil export revenues were approximately $18 billion in 1996[194] which constituted eighty-one percent of Iran's total export revenues.[195]

Iran's natural gas and petrochemicals industries are also worthy of note. Exceeded only by Russia, Iran possesses an estimated 742 trillion cubic feet of natural gas reserves, fifteen percent of the world's entire reserves.[196] Iran produces approximately 2.8 trillion cubic feet of natural gas annually, 1.3 trillion cubic feet of which is marketed.[197] Iran's production of natural gas is expected to rise sharply in the near future as additional reserves are discovered and the 328 trillion cubic foot South Pars gas field is further developed.[198] Iran's petrochemicals industry is the second largest in the Middle East after Saudi Arabia.[199] Iran's eleven petrochemical complexes have a capacity of ten million tons per year with plans to expand to sixteen million tons by 2000 and thirty million tons by 2020.[200]

Despite its internal difficulties and tightening U.S. sanctions, Iran's economy showed improved performance in 1995 and 1996. Gross domestic product for both years grew in excess of four percent annually.[201] Additionally, Iran acquired $5 billion in credits and loans from

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day of onshore production was exported by Iran in 1996. *See id.*

191. *See id.* at 6. Offshore production has grown considerably since 1989 when such capacity was 202,000 barrels per day. *See Oil and Gas*, *supra* note 178, at 1. This rapid increase is due, in part, to foreign investment which Iran permits in its offshore oil sector. Iran's onshore oil sector remains closed to foreign investment. *See* IRAN: EIA REPORT, *supra* note 181, at 6. Iran hopes to raise its offshore production to one million barrels per day by 2000. *See id.*

192. *See* IRAN: EIA REPORT, *supra* note 181, at 8. Iran has imported refined products since 1982. *See id.* However, the new Bandar Abbas refinery located near the Strait of Hormuz is expected to generate annual refined product exports totaling $1.75 billion annually in the near future. *See id.*

193. *See id.* at 1. The remaining 1.2 million barrels of daily production are consumed domestically. *See id.* Iran's major crude oil customers in 1997 were Japan (35%), South Korea (10%), the United Kingdom (10%), Turkey (3%), the Republic of China (3%), India (2%), Brazil (2%), Thailand (1%), Malaysia (1%) and Pakistan (1%). *See id.*

194. *See id.* at 1-2.

195. *See id.* at 1-2.

196. *See id.* at 1, 9. *See also Iran Says Gas Project Oppossed by U.S. Will Earn $45 Billion*, ASSOC. PRESS, Oct. 12, 1997, *available in* 1997 WL 4887770; *U.S. Investigating Iranian Gas Deal*, *supra* note 30. NIOC estimates Iran's natural gas reserves at 900 trillion cubic feet. *See* IRAN: EIA REPORT, *supra* note 181, at 9.

197. *See* IRAN: EIA REPORT, *supra* note 181, at 1, 9.

198. *See id.* at 9.

199. *See id.*

200. *See id.*

201. According to U.S. Government sources, Iran's gross domestic product grew an estimated 4.1 percent in 1996. *See* IRAN: EIA REPORT: *supra* note 181, at 1. However, the

European countries that have been utilized to finance much-needed improvements to Iran's economic infrastructure.[202] Furthermore, U.S. efforts to persuade its allies to economically isolate Iran met with failure. U.S. allies did not join the trade and investment ban or abandon their policy of constructive engagement through the maintenance of the so-called "critical dialogue."[203] Iranian trade with Europe, the Middle East and Asia continued to flourish despite the imposition of U.S. sanctions.[204] Of particular irritation to the United States was the growing trade between Iran and members of the European Union. Thirty-three percent of Iran's foreign trade is with Germany, Italy and France and accounts for more than three billion dollars annually.[205] Increasing trade and export revenues, especially in the oil, gas and petrochemical industries, allowed Iran to post a trade surplus in excess of $8 billion in 1996.[206] These developments led the U.S. Congress to conclude that the existing sanctions regime failed to adequately isolate Iran from the global economy and modify the behavior of U.S. allies.[207]

As a result of these perceived failures, ILSA was introduced in the U.S. Senate as Senate Bill 1228 on September 8, 1995 and in the U.S. House of Representatives as House Bill 3107 on March 19, 1996.[208] As

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Iranian Government claimed a six percent growth rate for 1996. *See Iran's Key Economic Indicators*, *supra* note 181, at 1. Iran's gross domestic product for 1996 was an estimated $710.4 billion. *See* IRAN: EIA REPORT, *supra* note 181, at 1.

202. *See* IRAN: EIA REPORT, *supra* note 181, at 2.

203. *See* H.R. REP. NO. 104-523(I) at 10 (1996). *See also* Robert Wierlaard, *Ties Won't Stop*, DAYTON DAILY NEWS, Apr. 29, 1997, *available in* 1997 WL 3936437. The European Union's policy of "critical dialogue" is contrary to U.S. policy in the Persian Gulf which is based upon the "dual containment" of Iran and Iraq through economic isolation and the threat of military deterrence. *See* William Drozdiak, *EU Nations' Envoys Going Back to Iran; Vote Spurns U.S. Appeal For Firm Stand On Iran*, WASH. POST, Apr. 30, 1997, at A15.

204. Iran's major trading partners are Germany, Italy, France, the United Kingdom, the Netherlands, Spain, Japan and Turkey. *See* IRAN: EIA REPORT, *supra* note 181, at 1. Iran's major export products are petroleum and related products, carpets (which account for forty percent of non-oil export revenues) and pistachio nuts. *See id.* at 1-2. *See also* Nora Boustany, *EU Nut Ban Irks Iran*, WASH. POST, Sept. 12, 1997, at A31. Iran's major imported products consist of machinery, military equipment, metals, foodstuffs, pharmaceuticals and technical services. *See* IRAN: EIA REPORT, *supra* note 181, at 1.

205. *See Iran Ignoring U.S. Trade Sanctions*, *supra* note 33. Germany is Iran's largest Western trading partner with trade between the two countries valued at $1.8 billion. *See* Drozdiak, *supra* note 203, at A15, *available in* 1997 WL 3670417. *See also* Wierlaard., *supra* note 203; *Iraqis Wish Saddam A Happy Birthday . . .*, WASH. TIMES, Apr. 29, 1997, at A15. Germany is also one of Iran's leading creditors with loans totaling in excess of $2.9 billion. *See EU to Send Ambassadors Back to Iran*, CHI. TRIB., Apr. 30, 1997, *available in* 1997 WL 3543986.

206. *See* IRAN: EIA REPORT, *supra* note 181, at 2.

207. *See id.* However, a NIOC executive admitted that U.S. sanctions have had a detrimental effect upon the Iranian economy especially in the area of foreign investment in the oil and gas industries. *See id.* at 2.

208. *See* H.R. REP. NO. 104-523(I), at 13-14 (1996); *see also supra* text accompanying

set forth above, the bills received little publicity until the June 25, 1996 bombing of the U.S. military housing complex in Dhahran, Saudi Arabia and the July 17, 1996 explosion of Trans-World Airlines Flight 800 off the coast of Long Island, New York.[209] In the aftermath of these events, the bill proceeded quickly through the U.S. Congress which rejected concerns regarding its extraterritorial reach and economic cost.[210] The bill was approved by the Senate on July 16, 1996 and by the House of Representatives on July 23, 1996.[211] President Clinton signed ILSA into law on August 5, 1996.[212]

As previously noted, international reaction to the adoption of ILSA was universal, immediate and hostile.[213] Most of the opposition centered around the provision requiring the President to impose economic sanctions upon persons whose investments in Iran exceed $40 million in any twelve month period and directly and significantly contribute to the enhancement of Iran's ability to develop its petroleum resources. Responses to ILSA included the issuance of condemnations and threats to enact retaliatory legislation and initiate dispute resolution proceedings pursuant to GATT.[214]

The reaction of private industry to ILSA was more divided. Some private enterprises took notice of the Act's provisions and moved to bring their policies into compliance. For example, in August 1996, Australian industrial conglomerate Broken Hill withdrew from a $3 billion pipeline project to transport Iranian natural gas to Pakistan and India.[215] The Japanese construction firm JGC withdrew from onshore natural gas projects in Iran.[216] According to the U.S. State Department, the threat of sanctions set forth in ILSA has discouraged foreign investment in eleven oil and gas projects in Iran.[217] ILSA has also sharply curtailed Iran's ability to obtain long-term capital to finance expansion of its oil, gas and petrochemicals industries.[218]

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note 4.

209. *See supra* notes 5-6 and accompanying text.

210. *See* H.R. REP. NO. 104-523(I), at 20-22. These concerns were expressed by Representative Lee H. Hamilton (Democrat, Indiana) and James P. Moran (Democrat, Virginia). Despite the rejection of their concerns by Congress, Representatives Hamilton and Moran voted in favor of ILSA. *See id.* at 22.

211. *See* H.R. REP. NO. 104-523(I), at 11.

212. *See* Pianin, *supra* note 8, at A8.

213. *See supra* notes 28-33 and accompanying text.

214. *See id.*

215. *See* IRAN: EIA REPORT, supra note 181, at 3. *See also U.S. Economic Offensive Against Iran's Energy Industry is Bearing Fruit*, WASH. POST, Mar. 3, 1997, at A8.

216. *See U.S. Economic Offensive Against Iran's Energy Industry is Bearing Fruit, supra* note 215, at A8.

217. *See U.S. Won't Bar Pipeline Across Iran*, WASH. POST, July 27, 1997, at A1.

218. *See U.S. Economic Offensive Against Iran's Energy Industry is Bearing Fruit, supra* note 215, at A8. British Petroleum executive John Browne has stated that the threat

Conversely, the vast majority of private enterprises chose to ignore ILSA and risk the imposition of sanctions. Several European companies registered their disapproval of ILSA by proceeding with investments in Iran's petrochemicals industries. In May 1997, the British petroleum firm Pell Frischmann, in conjunction with the Canadian petroleum firm Bow Valley, was awarded a $140 million contract to develop Iran's Balal oil field located in the Persian Gulf.[219] On September 28, 1997, Total SA of France announced the creation of an international consortium with Russia's natural gas monopoly, Gazprom,[220] and Malaysia's Petronas[221] to develop Iran's South Pars natural gas field.[222] The consortium's total investment in the project is expected to exceed two billion dollars.[223] Total also entered into negotiations to develop Iranian oil

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of U.S. sanctions has "definitely limited investments" in Iran. *Id.* Mohsen Yahyavi of the Iranian parliament's oil committee has admitted that ILSA is partially responsible for decreased foreign interest in Iran's oil and gas industries. *See id.*

219. The Iranian Oil Ministry awarded the development contract on May 10, 1997. *See U.S. Ponders Sanctions for Oil Deal in Iran*, WASH. POST, May 14, 1997, at A9. Until the imposition of U.S. sanctions, ARCO had been negotiating for the development rights to the 120 million barrel Balal field. *See* IRAN: EIA REPORT, *supra* note 181, at 6.

220. Gazprom is the leading producer of natural gas in the world and is Russia's largest company. *See Russia's Gazprom Cancels Loan Deal Over Criticism Of Iran Venture*, DOW JONES NEWS SERV., Dec. 18, 1997. Gazprom produces twenty-five percent of the world's natural gas and accounts for six to eight percent of Russia's gross domestic product. *See id.* The Russian government maintains a forty percent stake in Gazprom's ownership. *See U.S. Investigating Iranian Gas Deal, supra* note 30.

221. Petronas is Malaysia's national oil company. *See Malaysian Company Says Work In Iran Will Go Despite U.S. Protests*, ASSOC. PRESS, Nov. 17, 1997, *available in* 1997 WL 4892905. Petronas' President Hassan Marican has characterized the sanctions set forth in ILSA as an affront and interference in Petronas' internal affairs. *See id.*

222. *See* Harry Dunphy, *U.S. Opposes Pipeline*, ASSOC. PRESS, Oct. 23, 1997, *available in* 1997 WL 4889311. *See also Iran Gas Deal Defies U.S. Sanctions*, PITT. POST-GAZETTE, Sept. 30, 1997, at A4, *available in* 1997 WL 11849331; *Iran Says Gas Project Opposed by U.S. Will Earn $45 Billion*, supra note 196. Iranian officials have estimated that the South Pars field can produce as much as two billion cubic feet of natural gas and 75,000 barrels of liquefied gas worth $1.5 billion annually by 2002. *See Iran's Oil Minister in Moscow To Boost Ties*, ASSOC. PRESS, Nov. 13, 1997, *available in* 1997 WL 4892439. *See also Iran Says Gas Project Oppossed by U.S. Will Earn $45 Billion, supra* note 196. Iran's deputy oil minister Hadi Nejad- Hosseinian has estimated that gas sales revenues will exceed $45 billion over the life of the field. *See id.*

223. *See Russia, Iran Sign Gas Project Pact*, WASH. POST, Nov. 16, 1997, at A27. Total maintains a forty percent interest in the consortium while Gazprom and Petronas each maintain a thirty percent ownership interest. *See Iran Says Gas Project Oppossed by U.S. Will Earn $45 Billion, supra* note 196. The consortium has encountered some difficulty in obtaining financing for the project. The French government has refused to provide official credits to finance the project. *See* H.R. REP. NO. 104-523(I), at 10 (1996). However, some financial assistance from the French government will undoubtedly be forthcoming through its .9 percent ownership interest in Total. *See U.S. Investigating Iranian Gas Deal, supra* note 30. Gazprom has also had difficulty in obtaining financing. In November 1997, Gazprom postponed a $3 billion bond offering designed to raise capital for its Iranian ventures. *See Russian Gas Deal With Iran Is Put On Hold*, ST. LOUIS-DISPATCH,

fields in partnership with NIOC.[224] On October 1, 1997, another French oil company, Elf Aquitaine, announced that it was negotiating with the Iranian government for the acquisition of production rights to the Doroud oil field located in the Persian Gulf.[225] Additionally, in November 1997, Germany's Siemens Corporation was commissioned by the Iranian government to study the feasibility of an oil pipeline between Kazakhstan and Iran.[226]

Several non-European firms also chose to ignore the threat of sanctions pursuant to ILSA. On September 24, 1997, the Chinese National Petroleum Company, the state oil company of the Peoples' Republic of China, purchased a controlling interest in the second largest oil field in the newly-independent Central Asian republic of Kazakhstan.[227] China's $9.5 billion bid proved more attractive to the government of Kazakhstan than those submitted by American companies such as Amoco, Unocal, Texaco and Exxon in part because China promised to construct an oil pipeline from Kazakhstan to refineries in northern Iran.[228] Additionally, Chinese oil officials have agreed to form a joint venture with NIOC to explore offshore deposits in Iran and China and to upgrade Chinese refineries in order to process more Iranian oil.[229]

Turkey also ignored ILSA's call for further isolation of Iran by agreeing in August 1996 to purchase 140 billion cubic feet of Iranian natural gas annually commencing in 1998.[230] The agreement called for

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Nov. 12, 1997, at A10, *available in* 1997 WL 3377730. Gazprom cited unfavorable market conditions as the reason for the postponement. *See id.* However, the participation of U.S. investment bank Goldman, Sachs as lead underwriter for the transaction which could in turn trigger sanctions under ILSA may have played a role in the postponement. *See id.*

224. *See Total Chairman Says He's Negotiating With Iraq And Iran,* ASSOC. PRESS, July 2, 1997, *available in* 1997 WL 4873315. The development contract presently under negotiation has a purported value of $3.5 billion dollars. *See id.*

225. *See Avoiding Brawl? U.S. And EU Cautious Over Gas Deal With Iran,* ASSOC. PRESS, Oct. 5, 1997, *available in* 1997 WL 4886567. *See also Elf Aquitaine Exploring Oil Deals With Iran And Iraq,* ASSOC. PRESS, Oct. 1, 1997, *available in* 1997 WL 4886125. The Doroud field currently produces 170,000 barrels of oil per day. *See* IRAN: EIA REPORT, *supra* note 181, at 7. NIOC hopes to reinject natural gas into the field to increase its recoverable reserves by 600 million barrels and raise daily oil output to 290,000 barrels per day. *See id.* The estimated cost of the project is $530 million. *See id.*

226. *See* David B. Ottaway & Dan Morgan, *U.S. Backs Non-Iranian, 'Eurasian' Corridor West for Caspian Sea Oil,* WASH. POST, Nov. 20, 1997, at A37.

227. *See* David B. Ottaway & Dan Morgan, *China Pursues Ambitious Role in Oil Market,* WASH. POST, Dec. 26, 1997, at A1.

228. *See id. See also* David B. Ottaway & Dan Morgan, *Deal Tests U.S. Policy on Tehran,* WASH. POST, Oct. 12, 1997, at A1. The Chinese National Petroleum Company's bid also included a promise to construct a $3.5 billion, 1800 mile pipeline from Kazakhstan to China. *See* Ottaway & Morgan, *supra* note 227, at A1.

229. *See* Ottaway & Morgan, *supra* note 227, at A1.

230. *See* Thomas W. Lippman, *U.S. Decries Turkey's Gas Deal with Tehran,* WASH. POST, Aug. 13, 1996, at A1. *See also Iran Signs $20 Billion Gas Deal,* ASSOC. PRESS, Aug. 12, 1996, *available in* 1996 WL 2175459.

the joint construction of a 328 mile pipeline from Tabriz in western Iran to Erzurum in eastern Turkey at a cost of $400 million to be divided equally between the countries.[231] The total value of Turkish purchases of Iranian gas throughout the twenty-two year term of the agreement is estimated at $23 billion.[232] Turkey and Iran also signed numerous accords in December 1996 granting each other most favored nation trading status and promoting bilateral investment.[233] In addition, Iran and Pakistan continued to discuss the construction of a gas pipeline from the South Pars gas field in Iran to Karachi,[234] and construction commenced on a $135 million gas pipeline from Iran to Armenia.[235]

The resource-rich fledging republics of Central Asia also ignored ILSA's prohibitions.[236] Kazakhstan concluded an agreement for crude

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231. *See Turkey To Receive Iranian Natural Gas In 1998*, AGENCE FR.-PRESSE, Nov. 5, 1996, *available in* 1996 WL 12173021. Plans called for the pipeline to reach an ultimate length of 680 miles to the Turkish coast at an additional cost of one billion dollars. *See Iran Signs $20 Billion Gas Deal*, *supra* note 230. Botas, the state-owned Turkish oil company, opened the bidding process for construction of the pipeline in early 1997. *See* IRAN: EIA REPORT, *supra* note 181, at 11.

232. *See* Lippman, *supra* note 230, at A1. Pursuant to the agreement, Iran was scheduled to begin shipping 105 billion cubic feet of natural gas a year through the pipeline by 1998 with deliveries rising to 350 billion cubic feet in 2005. *See id.* However, construction of the proposed pipeline had not yet commenced, and substantial obstacles remained to the completion of the project as of the time of the preparation of this article. *See* Kelly Couturier, *Turkey Aims To Satisfy Its Fuel Needs*, WASH. POST, Oct. 20, 1997, at A17.

233. *See Ignoring U.S., Turkey and Iran Sign Trade Accords*, WASH. POST, Dec. 22, 1996, at A31.

234. *See* IRAN: EIA REPORT, *supra* note 181, at 11. Construction of the $3 billion, 1.6 billion cubic feet per day pipeline was proposed in an January 1995 agreement between the countries dated January 1995. *See id.* However, a final agreement had not been negotiated at the time of the preparation of this article. *See id.*

235. *See id.* In mid-1995, Iran and Armenia signed a renewable fifteen year contract whereby Iran agreed to supply 100 million cubic feet of natural gas per day to Armenia. *See id.* Construction of the pipeline necessary to accomplish these deliveries is underway, and shipments of gas are expected to commence in 1999. *See id.*

236. The oil and gas deposits located in the newly-independent republics of Azerbaijan, Kazakhstan, Turkmenistan and Uzbekistan rival those of the Middle East. Current industry estimates place oil reserves in the region at 200 billion barrels worth $4 trillion at current market prices. *See* Myre, *supra* note 189. The Persian Gulf contains approximately 670 billion barrels of oil. *See id.* Bordering the western shore of the oil-rich Caspian Sea and possessing the enormous Azeri-Chirag-Guneshli oil field, Azerbaijan has proven crude oil reserves of 3 billion barrels with estimates of ultimate reserves as high as 40 billion barrels. *See* U.S. DEP'T OF COMMERCE, AZERBAIJAN: ECONOMIC AND TRADE OVERVIEW 2 (visited Oct. 13, 1998) <http://www.itaiep.doc.gov/bisnis/country/azecon.html>. Bordering the northern and eastern shores of the Caspian Sea and possessing the lucrative Tenghiz oil field, Kazakhstan produced 27 million tons of crude oil in 1997. *See* U.S. DEP'T OF COMMERCE, COUNTRY COMMERCIAL GUIDE: KAZAKHSTAN 1 (visited Oct. 13, 1998) <http://www.itaiep.doc.gov/bisnis/country/kzccg.html>. Turkmenistan also borders the eastern shore of the Caspian Sea and possesses the fourth largest natural gas reserves in the world estimated at 98 to 155 trillion cubic feet, 1.2 trillion cubic feet of which was produced in 1996. *See* U.S. ENERGY INFORMATION ADMINISTRATION: TURKMENISTAN REPORT 3, 5 (visited Oct. 13, 1998) <http://www.eia.doe.gov/emeu/cabs/turkmen.html>.

oil exchanges with Iran in May 1996.[237] In May 1997, Turkmenistan signed an agreement to sell three billion cubic feet per day of natural gas to Turkey.[238] Gas will be transported through a two thousand mile long pipeline between the two countries including a 788 mile section through northern Iran.[239] The pipeline will be constructed at a cost of $1.6 billion.[240] The initial 125 mile segment carrying natural gas from Korpedzhe, Turkmenistan to Kord Kuy in northeastern Iran was activated on December 29, 1997.[241] Future expansion of the pipeline to Europe is anticipated in the next several years.[242]

Faced with international furor and confusion, the Clinton administration investigated several of these transactions in order to determine their compliance with ILSA. However, despite promises to "fully and completely" enforce ILSA, the Clinton administration has failed to impose sanctions upon a single foreign firm maintaining or proposing investments in Iran.[243] The United States failed to sanction Pell Frischmann or Bow Valley for their contract with NIOC to develop the

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Turkmenistan also possesses 1.5 billion barrels of proven oil reserves with crude oil production of 88,000 barrels per day. *Id.* Landlocked Uzbekistan is among the world's top ten producers of natural gas and produced more than 8 million tons of crude oil in 1995. *See* U.S. DEP'T OF COMMERCE, UZBEKISTAN: ECONOMIC OVERVIEW 3 (visited Oct. 13, 1998) <http://www.itaiep.doc.gov/bisnis/country/uzecon.html>.

237. *See Kazakhstan Starts Shipping Oil Through Iran,* AGENCE FR.-PRESSE, Jan. 18, 1997, *available in* 1997 WL 2042671. *See also* IRAN: EIA REPORT, *supra* note 181, at 4. Under the ten year term of the agreement, Kazakhstan agreed to ship oil by tanker to Iranian refineries on the coast of the Caspian Sea in exchange for the option of lifting either Iranian light or heavy blend crude oil at Iran's Kharg Island facility in the Persian Gulf. Shipments were to total two million to six million tons annually. *See Report Says Kazakhstan, Iran Temporarily Cease Oil Swap,* DOW JONES ONLINE NEWS, Oct. 22, 1997. However, the agreement was suspended by Iran in October 1997 due to concerns about the quality of the oil received by Iran from Kazakhstan. *See id.*

238. *See U.S. Won't Bar Pipeline Across Iran, supra* note 217, at A1.

239. *See id.* The transaction involves a "gas swap" whereby Turkmenistan would pump gas into Iran, and Iran would send an equal amount of Iranian gas to Turkey. *Id.* Iran would reap transit fees for allowing gas to flow through its territory. *Id.*

240. *Id. See also Clinton Won't Oppose Pipeline Through Iran,* ASSOC. PRESS, July 27, 1997, *available in* 1997 WL 3504218.

241. *See* Alexander Vershinin, *Iran-Turkmenistan Gas Line Opens 125 Mile Line,* ASSOC. PRESS, Dec. 30, 1997, *available in* 1997 WL 14978140. The $200 million cost of the initial 125 mile segment was financed by NIOC (80%) and the Turkmen government (20%). *See* IRAN: EIA REPORT, *supra* note 181, at 11.

242. *See Turkmenistan, Iran and Turkey Reach Caspian Gas Agreements,* ASSOC. PRESS, Dec. 28, 1997, *available in* 1997 WL 4898580. Iran, Turkey and Turkmenistan executed an agreement providing for the extension of the pipeline to Europe on December 28, 1997. *See id.* The leading candidate to construct the pipeline is a consortium comprised of Italy's Snamprogetti, Gas de France and the British-Dutch energy conglomerate Royal Dutch Shell. *See U.S. Won't Bar Pipeline Across Iran, supra* note 217, at A1.

243. *See Iran-France Pact Viewed as Affront to U.S. Sanctions,* ASSOC. PRESS, Oct. 6, 1997, *available in* 1997 WL 2485305.

Balal oil field.[244] After receiving threats of retaliation from the European Union,[245] President Clinton elected not to impose sanctions upon Total for its participation in the consortium to develop Iran's South Pars natural gas field.[246] The United States also failed to sanction Gazprom for its role in the South Pars consortium after receiving protests from the Russian government[247] and Gazprom's cancellation of a November 1994 agreement with the Export-Import Bank that guaranteed $750 million in financing for purchases of equipment and services from American companies.[248] Additionally, after condemning Turkey's agreement to purchase Iranian natural gas,[249] the United States refused to sanction the proposed alternate Turkmenistan-Turkey pipeline route through Iran on the bases that the agreement predated the enactment of ILSA,[250] the project did not facilitate Iranian gas production[251] and Iran was paying for the portion of the pipeline passing through its territory.[252] Rather, the Clinton administration praised the project as delivering "Central Asian energy resources to the market in a way that minimizes assistance to Iran."[253] The Clinton Administration subsequently condemned the project based upon the benefits that the pipeline could confer on Iran.[254] However, the Administration again re-

244. *See U.S. Ponders Sanctions for Oil Deal in Iran, supra* note 219, at A9.

245. *See* Casert, *supra* note 33. Sir Leon Brittan, the European Union's foreign trade minister, stated that Total was "fully entitled" to enter into the agreement, and any interference by the United States would "set in motion a chain of events which could seriously damage the wider relationship." Casert, *supra* note 32. The French government condemned the purported extraterritorial reach of ILSA and issued a statement that application of the law to Total "would have serious consequences on international trade." *France Cautions U.S. Against Sanctions Over Natural Gas Deal With Iran*, ASSOC. PRESS, Sept. 29, 1997, *available in* 1997 WL 4885627.

246. *See* Dan Balz, *U.S. Eases Stand on Cuba, Iran Sanctions; Helms Condemns, Europe Hails Move*, WASH. POST, May 19, 1998, at A15. The Clinton Administration elected to exert more pressure on the European Union to condemn Iranian acts of terrorism. *See U.S. Not Eager to Enforce Sanctions Over Iran Gas Deal*, ASSOC. PRESS, Oct. 3, 1997, *available in* 1997 WL 4886537. U.S. State Department spokesman James Rubin rationalized this decision by stating that "[t]he objective of the legislation is not to impose sanctions . . . [but rather] to get other countries, in Europe in particular, to work with us on the subject of tightening up the pressure on Iran." Thomas W. Lippman, *U.S. Defers Sanctions on Iran Gas Deal*, WASH. POST, Oct. 4, 1997, at A1.

247. *See Iran's Oil Minister in Moscow To Boost Ties, supra* note 222. Boris Nemtsov, Russia's first deputy prime minister, stated that the Russian government would fully support Gazprom's participation in the South Pars consortium. *See id.*

248. *See Russia's Gazprom Cancels Loan Deal Over Criticism Of Iran Venture, supra* note 220.

249. *See* Lippman, *supra* note 230, at A1.

250. *See U.S. Closely Watches Plan For Natural Gas Pipeline Through Iran*, AGENCE FR.-PRESSE, Dec. 29, 1997, *available in* 1997 WL 13462550.

251. *See* Ottaway & Morgan, *supra* note 228, at A1.

252. *See* Thomas W. Lippman, *New Iran Leader Provides Opportunity for Change; But Khatami Indicates No Muting of Hostility*, WASH. POST, Aug. 3, 1997, at A23.

253. *See Clinton Won't Oppose Pipeline Through Iran, supra* note 240.

254. *See U.S. Affirms Opposition to Energy Pipelines Crossing Iran*, DOW JONES INT'L NEWS, Jan. 19, 1998.

fused to sanction any of the parties to the project. Additionally, the Clinton administration expressed support for a multi-billion dollar pipeline stretching westward from Kazakhstan across the Caspian Sea to Azerbaijan and Georgia.[255]

Domestic reaction to the Clinton administration's failure to impose sanctions pursuant to ILSA has been mixed. Several members of Congress expressed disappointment and outrage at President Clinton's reluctance to impose sanctions. The chief Congressional critic was one of ILSA's namesakes, Senator Alfonse M. D'Amato of New York. Senator D'Amato condemned Turkey's contract to purchase natural gas from Iran as clearly within ILSA's parameters and "a direct challenge to [U.S.] policy of economically isolating Iran."[256] Senator D'Amato also criticized the Clinton Administration's refusal to sanction the Turkmeni-Turkish pipeline agreement as "send[ing] a message of weakness to Iran," and undermining U.S. efforts to persuade its European allies to join the economic embargo on Iran.[257] Additionally, Senator D'Amato demanded the imposition of sanctions against Total for its investment in the South Pars gas field stating that the Administration's failure to take "decisive action . . . undercut long-standing policy against Iranian terrorism" and opened the floodgates for foreign investment in Iran's oil and gas industries.[258] The Clinton Administration was also condemned as overly sensitive to the negative reaction of U.S. allies regarding ILSA.[259] Finally, the decisions not to vigorously implement ILSA were further condemned as failing to force Iran and its leaders to "actually pay a real economic price for their sponsorship of international terrorism."[260] According to the Clinton Administration's critics, the Khatami administration in Tehran had not yet earned a reprieve from U.S. economic sanctions.[261]

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255. *See* Ottaway & Morgan, *supra* note 226, at A37. *See also* Thomas W. Lippman, *Clinton Meets with Turkmen President*, WASH. POST, Apr. 24, 1998, at A14.

256. Lippman, *supra* note 230, at A1.

257. Lippman, *supra* note 252, at A23.

258. Thomas W. Lippman, *U.S. Defers Sanctions on Iran Gas Deal*, WASH. POST, Oct. 4, 1997, at A1. *See also Sanctions On France*, WASH. POST, Oct. 1, 1997, at A24, characterizing the failure to impose sanctions on Total as inviting "a painful blow to [U.S.] interest and pride." *See also* John Lancaster, *Tehran Reacts Coolly to Sanctions Waiver*, WASH. POST, May 20, 1998, at A19; Thomas W. Lippman, *Senators Ask Sanctions Over Iranian Gas Deal*, WASH. POST, May 9, 1998, at A20; Thomas W. Lippman, *U.S. Aides Still Divided Over Sanctions on Foreign Investors in Iran*, WASH. POST, Mar. 6, 1998, at A33.

259. *See* Stephen S. Rosenfeld, *Bridging the Atlantic Divide*, WASH. POST, Aug. 9, 1996, at A17. Rosenfeld concludes that "a little tension with the allies over something extremely important where the United States has a strong position and has showed patience may not be such a bad thing after all . . . . [s]uch [tension] can be justified in the face of a clear and politically uncluttered terrorist menace." *Id. See also U.S. Aides Still Divided Over Sanctions on Foreign Investors in Iran*, *supra* note 258, at A33.

260. *U.S. Ponders Sanctions for Oil Deal in Iran*, *supra* note 219, at A9 (quoting Hillary Mann, an analyst employed by the Washington Institute for Near East Policy).

261. *See* Peter W. Rodman, *Why Ease Up on Iran?*, WASH. POST, Dec. 11, 1996, at A25.

However, the Clinton administration's decision was not subject to universal condemnation. Richard N. Haass, the director of foreign policy studies at the Brookings Institution, praised President Clinton's failure to impose sanctions as a prudent decision designed not to send "a hostile signal to the new leadership in Tehran at a time when the United States might usefully explore establishing a dialogue."[262] The Administration's decision was also praised as a recognition of the general ineffectiveness of unilateral economic sanctions as well as Iran's ability to escape the harshest consequences of such sanctions.[263] Additionally, the imposition of sanctions were also condemned as harmful to the interests of American businesses operating overseas as well as relations between the United States and its European and Asian allies.[264] Regardless of their bases for praising the Clinton administration's restraint in refusing to implement ILSA, all of the commentators agreed that a reassessment of U.S. policy towards Iran is long overdue.[265]

III. PROVISIONS OF THE IRAN AND LIBYA SANCTIONS ACT OF 1996

ILSA provides for three specific methods for accomplishment of the purposes set forth in Section I of this article.[266] Initially, Section 4(a) urges the President to immediately commence diplomatic efforts in appropriate international forums and in bilateral negotiations to establish a multilateral sanctions regime against Iran including limitations upon foreign investments in Iran's oil, gas and petrochemicals industries.[267] ILSA provides that the President's efforts in this regard be consistent with U.S. policy towards Iran which, according to Congress, includes the retardation of the development of "Iran's ability to explore for, extract, refine or transport by pipeline [its] petroleum resources."[268] Section 2 sets forth four goals which should underlie the President's multilateral and bilateral efforts. Initially, the President's efforts should be designed to inhibit Iran's development of weapons of mass destruction and associated delivery systems.[269] Secondly, the President's efforts

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Rodman is director of national security programs at the Nixon Center for Peace and Freedom.

262. Richard N. Haass, *Sanctions-With Care,* WASH. POST, July 27, 1997, at C9.

263. *See* Shaul Bakhash, *From Iran, an Understated Overture*, WASH. POST, Dec. 18, 1997, at A27.

264. *See* Thomas W. Lippman, *Politicians at Odds on Sanctions Policy*, WASH. POST, May 19, 1998, at A17. *See also* Robin Wright, *U.S. Losing Support in 'Containing' Iraq and Iran*, L.A. TIMES, Oct. 26, 1997, at A1.

265. *See* Haass, *supra* note 262, at C9. *See also* Bakhash, *supra* note 263, at A27; Wright, *supra* note 264, at A1.

266. *See supra* notes 9-19 and accompanying text.

267. *See* ILSA, Pub. L. No. 104-172, § 4(a), 110 Stat. 1541, 1542-43 (1996).

268. *See id.* § 3(a). Section 14(15) defines "petroleum resources" as "petroleum and natural gas resources." *See id.* § 14(15).

269. *See id.* § 2(1).

should attempt to inhibit the Iranian Government's support of acts of international terrorism.[270] Congress specifically determined that Iranian sponsorship of such acts endanger the national security and foreign policy interests of the United States and those members of the international community which share U.S. strategic and foreign policy interests.[271] Thirdly, Congress urged the President to strive to deny Iran the financial resources necessary to sustain its nuclear, chemical, biological and ballistic missile weapons programs as well as its support for international terrorism.[272] Finally, ILSA calls upon the President to endeavor to terminate the continuing use of diplomatic facilities and quasi-governmental institutions by the government of Iran to promote acts of international terrorism and assist in its nuclear, chemical, biological and ballistic missile weapons programs.[273] Other than the United Nations, ILSA does not identify the international forums in which such efforts are to occur and leaves the means by which its goals are to be accomplished to presidential discretion.[274]

The second method by which ILSA seeks to accomplish its purposes is through increased consultation between the President and Congress regarding U.S. policy towards Iran. ILSA requires four separate consul-

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270. *See id.* § 14(1) defines an "act of international terrorism" as follows:

> Act of International Terrorism - The term "act of international terrorism" means an act which is violent or dangerous to human life and that is a violation of the criminal laws of the United States or of any State or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and which appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping.

See id. § 14(1).

271. *See id.* § 2(1).

272. *See id.* § 2(2). Congress was particularly concerned about Iran's efforts to develop nuclear weapons. *See supra* notes 143-44 and accompanying text. Section 14(13) defines a "nuclear explosive device" as follows:

> Nuclear Explosive Device - The term "nuclear explosive device" means any device, whether assembled or disassembled, that is designed to produce an instantaneous release of an amount of nuclear energy from special nuclear material (as defined in Section 11(aa) of the Atomic Energy Act of 1954) that is greater than the amount of energy that would be released from the detonation of one pound of trinitrotoluene (TNT).

See ILSA, Pub. L. No. 104-172, § 14(13), 110 Stat. 1541, 1550 (1996).

273. *See* ILSA, § 2(3). Section 14(10) defines "Iran" as the Iranian Government as well as any of its agencies or instrumentalities. *See id.* § 14(10).

> 'Iranian diplomats, representatives and quasi-governmental institutions' are defined as including 'employees, representatives or affiliates of Iran's Foreign Ministry, Ministry of Intelligence and Security, Revolutionary Guard Corps, Crusade for Reconstruction, Qods (Jerusalem) Forces, Interior Ministry, Foundation for the Oppressed and Disabled, Prophet's Foundation, June 5th Foundation, Martyr's Foundation, Islamic Propagation Organization and the Ministry of Islamic Guidance.'

See id. § 14(11).

274. *See id.* § 4(a).

tations between the executive and legislative branches regarding U.S. policy towards Iran. Initially, Section 4(b) requires the President to report to appropriate Congressional committees on the success of his bilateral and multilateral efforts to economically isolate Iran pursuant to Section 4(a).[275] The initial report must be filed with Congress no later than one year from the date of ILSA's enactment with subsequent reports to be filed on a periodic basis.[276] Each report must identify those countries which have undertaken measures to deter Iranian support for international terrorism, its acquisition of weapons of mass destruction and development of its petroleum resources.[277] The report must include a description of each listed countries' anti-Iranian measures.[278] Additionally, the report must include a list of those countries which have not adopted such measures and the President's recommended course of action with respect to such countries.[279]

Additionally, the President was required to file an interim report on multilateral sanctions against Iran with appropriate Congressional committees no later than ninety days after ILSA's enactment.[280] This report was required to address three separate issues. Initially, the report was required to determine the existence of "legislative or administrative standards providing for the imposition of trade sanctions on persons or their affiliates doing business or having investments in Iran" in the member states of the European Union, the Republic of Korea, Australia, Israel and Japan.[281] Secondly, the report was required to determine the extent and duration of the application of sanctions against Iran by any of the above-listed countries.[282] Decisions of the World Trade Organization or its predecessor organization regarding the compatibility of such sanctions with the dictates of international trade as set forth in GATT was the third and final topic for inclusion within the report required by Section 4(e).[283]

The third instance of legislatively-mandated consultation between the President and Congress concerns the imposition, delay and waiver of sanctions. Section 9(a)(4) of ILSA requires the President to report to Congress no later than ninety days after electing to impose sanctions

275. *See id.* § 4(b). "Appropriate Congressional Committees" are defined as "the Committee on Finance, the Committee on Banking, Housing, and Urban Affairs, and the Committee on Foreign Relations of the Senate and the Committee on Ways and Means, the Committee on Banking and Financial Services, and the Committee on International Relations of the House of Representatives." *See id.* § 14(2).

276. *See id.* § 4(b).

277. *See id.* § 4(b)(1).

278. *See id.*

279. *See id.* § 4(b)(2).

280. *See id.* § 4(e).

281. *See id.* § 4(e)(1). Noticeable by its absence was any reference to legislative and administrative standards providing for the imposition of trade sanctions against Iran by Canada, the U.S. largest trading partner.

282. *See id.* § 4(e)(2).

283. *See id.* § 4(e)(3).

pursuant to Section 5.[284] This report must disclose the status of consultations with the foreign government possessing primary jurisdiction over the sanctioned person and the reasons supporting any delays in the actual enforcement of sanctions.[285] Additionally, Section 9(c)(1) requires the President to submit a report to the appropriate Congressional committees prior to waiving the initial or continued imposition of sanctions.[286] A waiver of sanctions pursuant to this section become effective no less than thirty days after the President determines and reports to Congress that the waiver is necessary to serve the national interests of the United States.[287] The report must contain "a specific and detailed rationale" for the waiver including a description of the conduct that resulted in the threatened or actual imposition of sanctions.[288] In the case of a foreign person, the report must also contain an explanation of the President's efforts "to secure the cooperation of the government with primary jurisdiction over the sanctioned person to terminate or, as appropriate, penalize the activities that resulted in the [actual or threatened imposition of sanctions]."[289]

The final instance when consultations are required between the executive and legislative branches concerns the President's initiatives to further isolate Iran in the international community. In order to "contribute to [Congress'] ability to evaluate the effectiveness of [ILSA],"[290] the President is required to transmit a report to Congress no later than six months after the enactment of ILSA and every six months thereafter describing his efforts to initiate a multilateral campaign to pressure Iran to cease its support of acts of international terrorism and develop-

284. *See id.* § 9(a)(4).

285. *See id.*

286. *See id.* § 9(c)(1).

287. *See id.* According to Congress, the national interests of the United States include:

> cases in which imposition of sanctions would threaten U.S. intelligence sources and methods, where a particular sanction would raise significant issues under the international obligations of the U.S., and where international cooperation in pursuit of the goals of the bill could be jeopardized, rather than assisted, through unilateral U.S. action, or where sanctions would lead to unacceptable costs to U.S. economic interests.

See H.R. REP. NO. 104-523(II), at 18 (1996).

288. *See* ILSA, § 9(c)(2)(A).

289. *Id.* § 9(c)(2)(B). Section 14 defines "persons" to include natural person, corporations, business associations, partnerships, societies, trusts, nongovernmental entities, organizations or groups, governmental entities operating as business enterprises and any of their successors. *See id.* § 14(A)-(C). "U.S. persons" are defined as U.S. citizens in the case of natural persons and corporations or other legal entities organized pursuant to the laws of the United States or any of its States or territories if U.S. citizens "own, directly or indirectly, more than fifty percent of the outstanding capital stock or other beneficial interest" in the entity. *See id.* § 14(17)(A)-(B). "Foreign persons" are defined as all persons who do not meet the requirements set forth in the definition of U.S. persons. *See id.* §14(7)(A)-(B).

290. H.R. REP. NO. 104-523(II), at 18.

ment of weapons of mass destruction.[291] Additionally, the President's report is required to detail his efforts to persuade other countries to reduce the presence of Iranian diplomats and representatives within their respective jurisdictions and expel any such persons who participated in the seizure of the U.S. embassy and ensuing hostage crisis.[292] The President's report must also describe the extent to which the International Atomic Energy Agency has established regular inspections of all nuclear facilities in Iran[293] and Iran's use of its diplomats and representatives to promote acts of international terrorism and further its development of weapons of mass destruction.[294] Finally, this section requires the President to ensure the continued transmittal to Congress of reports concerning Iran's military capabilities[295] and its support for acts of international terrorism as part of the State Department's annual report on terrorism.[296]

The third method by which ILSA seeks to accomplish its objectives is clearly the most controversial. Section 5(a) provides for the imposition of economic sanctions upon persons who, with actual knowledge, make an investment of $40 million or more in any twelve month period which directly and significantly contributes to the enhancement of Iran's ability to develop its petroleum resources. Recognizing the President's primary responsibility for the conduct of U.S. foreign affairs, this section grants "broad latitude" to the President in determining under what circumstances sanctions would be appropriate and their ultimate form and implementation.[297] Nevertheless, Congress fully expected the complete and timely implementation of sanctions having a "demonstrable impact" upon all persons engaging in conduct in violation of ILSA.[298]

Section 5(a) requires the imposition of two or more sanctions enumerated in Section 6 if the President determines that a person has, with actual knowledge, made an investment[299] of $40 million or more

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291. *See* ILSA, § 10(a)(1).

292. *See id.* § 10(a)(2).

293. *See id.* § 10(a)(3).

294. *See id.* § 10(a)(4).

295. *See id.* § 10(b)(1). This report is required by Section 601(a) of the Nuclear Non-Proliferation Act of 1978 and Section 1607 of the National Defense Authorization Act for Fiscal Year 1993. *See* 22 U.S.C. § 3281 (1994) and Pub. L. No. 102-484, 106 Stat. 2571 (1992).

296. *See* ILSA, § 10(b)(2).

297. H.R. REP. NO. 104-523(I), at 14 (1996).

298. *Id.* at 15, 17.

299. The term "investment" is defined as:

> any of the following activities if such activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Iran or a nongovernmental entity in Iran . . . on or after the date of enactment of this Act: The entry into a contract that includes responsibility for the development of petroleum resources located in Iran . . . or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a

that directly and significantly contributed to the enhancement of Iran's ability to develop[300] its petroleum resources.[301] The prohibited investment may be in one lump sum or may consist of any combination of investments of at least $10 million each which in the aggregate equal or exceed $40 million in any twelve month period.[302] In order to qualify as sanctionable conduct, the investment must have occurred on or after the date of ILSA's enactment.[303] The amount of the $40 million "investment trigger" is lowered to $20 million dollars in any twelve month period with respect to the nationals of all countries other than those designated by the President pursuant to Section 4(c)[304] at any time after the President has submitted his initial report to Congress as required by Section 4(b).[305] This $20 million investment may also be in one lump sum or may consist of a combination of investments of at least $5 million each which in the aggregate equal or exceed $20 million in any twelve month period.[306]

Section 5(c) identifies two classifications of persons subject to the imposition of sanctions. Initially, sanctions must be imposed against any person the President determines to have engaged in an investment in Iran prohibited by Section 5(a).[307] The President may also impose sanctions upon any person he determines to be a successor entity, parent, subsidiary or affiliate of a sanctioned person.[308] However, prior to imposing sanctions against a parent or subsidiary, the President must find that the parent or subsidiary, with actual knowledge, made a prohibited investment in violation of Section 5(a).[309] With regard to affiliates, the President must not only find the existence of a prohibited investment made with actual knowledge but must also conclude that the

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> contract; The purchase of a share of ownership, including an equity interest, in that development; The entry into a contract providing for the participation in royalties, earnings or profits in that development, without regard to the form of the participation. The term "investment" does not include the entry into, performance or financing of a contract to sell or purchase goods, services or technology.

See ILSA, § 14(9).

300. The terms "develop" and "development" of petroleum resources are defined as "the exploration for, or the extraction, refining or transportation by pipeline of, petroleum resources." *See id.* § 14(4).

301. *See id.* § 5(a).

302. *See id.*

303. *See id.*

304. *See infra* notes 338-40 and accompanying text. The President must identify for Congress all countries which are exempt from the lowered "investment trigger" established by Section 4(d)(1). *See* ILSA, § 4(d)(1).

305. *See* ILSA, § 4(d)(1). *See also supra* notes 295-99 and accompanying text.

306. *See* ILSA, § 4(d)(1).

307. *See id.* § 5(c)(1).

308. *See id.* § 5(c)(2)(A)-(C).

309. *See id.* § 5(c)(2)(B).

affiliate is controlled by the sanctioned person.[310] A list of such sanctioned persons and prohibited investments must be published on a periodic basis in the *Federal Register*.[311] Additionally, concerned persons may request an advisory opinion from the Secretary of State as to whether a proposed investment violates ILSA's prohibitions.[312] Good faith reliance upon an opinion which determines that the proposed investment does not violate ILSA exempts the requesting party from sanctions based upon its subsequent participation in the investment.[313] The President's decision to impose sanctions is not subject to judicial review.[314]

Once the President determines that the imposition of sanctions is appropriate, he must impose two of the six sanctions listed in Section 6. The actual sanctions selected are subject to the President's exercise of discretion.[315] The available sanctions may be categorized in four separate classifications. The first and largest classification consists of prohibitions involving financial institutions.[316] Initially, the President may instruct the Export-Import Bank of the United States to reject any guarantee, insurance, extension of credit or participation in the extension of credit in connection with the export of any goods or services to any sanctioned person.[317] Additionally, the U.S. Government may prohibit any U.S. financial institution[318] from making loans or providing credits to sanctioned persons totaling more than $10 million in any twelve month period.[319] Loans or credits to persons engaged in activities to relieve human suffering are exempted from this prohibition if such loans or credits are to be utilized for such humanitarian purposes.[320]

If the sanctioned person is a financial institution, the U.S. Government may impose one or both of two available sanctions. Initially, the U.S. Government may bar the Federal Reserve System and the Federal

310. *See id.* § 5(c)(2)(C).

311. *See id.* § 5(d)-(e).

312. *See id.* § 7.

313. *See id.*

314. *See id.* § 11. Congress did not believe judicial review to be prudent given the careful and deliberate fashion in which sanctions are imposed pursuant to the Act and the necessity of timely implementation given the serious national security risk posed by Iran. *See* H.R. REP. NO. 104-523(I), at 17 (1996).

315. *See* H.R. REP. NO. 104-523(II), at 17.

316. *See* ILSA, § 6 (1), (3) and (4).

317. *See id.* § 6(1).

318. The term "financial institution" is defined to include:

> (A) a depository institution (as defined in section 3(c)(1) of the Federal Deposit Insurance Act), including a branch or agency of a foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978); (B) a credit union; (C) a securities firm, including a broker or dealer;
>
> (D) an insurance company, including an agency or underwriter; and (E) any other company that provides financial services.
>
> *See id.* § 14(5).

319. *See id.* § 6(3).

320. *See id.*

Reserve Bank of New York from designating or permitting the continuation of a sanctioned financial institution as a primary dealer in U.S. Government debt instruments.[321] In addition, a sanctioned financial institution may not serve as an agent of the U.S. Government or serve as a repository for U.S. Government funds.[322] The imposition of both of these sanctions against a financial institution constitutes two separate sanctions.[323]

The second, third and fourth classifications consist of procurement and trade sanctions. The U.S. Government may be prohibited from procuring, or entering into any contract for the procurement of, any goods or services from a sanctioned person.[324] Additionally, the President may order the U.S. Government to deny permission, authority or a license to export any goods or technology to a sanctioned person pursuant to the Export Administration Act of 1979,[325] the Arms Export Control Act[326] and the Atomic Energy Act of 1954.[327] The U.S. Government may also refuse to grant a license for the export of any goods or services to a sanctioned person pursuant to any other federal statute that requires its prior review and approval.[328] Finally, the President may impose sanctions, as appropriate, to restrict imports with respect to a sanctioned person in accordance with IEEPA.[329]

ILSA provides the President with considerable discretion to waive, delay or grant exceptions to the imposition of sanctions. Section 5(f) of ILSA sets forth numerous instances when the President may except persons from the imposition of sanctions on the basis of national security. Specifically, the President is not required to apply or maintain sanctions in the case of existing procurement contracts, subcontracts and options for goods and services utilized for national defense and essential to U.S. national security.[330] Government procurement contracts, subcontracts and options are also immune from sanctions if the President determines that the person subject to sanctions is the sole source supplier of essential goods or services and there are no readily or rea-

321. *See id.* § 6(4)(A).

322. *See id.* § 6(4)(B).

323. *See id.* § 6(4).

324. *See id.* § 6(5).

325. *See id.* § 6(2)(i). *See also* Export Administration Act of 1979, 50 U.S.C. app. § 2405 (1998).

326. *See* ILSA, § 6(2)(ii). *See also* Arms Export Control Act, 22 U.S.C. §§ 2751-2756 (1994).

327. *See* ILSA, § 6(2)(iii). *See also* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2023 (1994).

328. *See* ILSA, § 6(2)(iv).

329. *See id.* § 6(6). In order to invoke sanctions pursuant to this section of ILSA, a national economic emergency must be declared by the President pursuant to sections § 1702(a)(1)(A)-(B) of IEEPA, 50 U.S.C. (1998). *See also* H.R. REP. NO. 104-523(II), at 17 (1996).

330. *See* ILSA, § 5(f)(1)(A).

sonably available alternate sources.[331] Additionally, the President may provide an exception for goods and services essential to national security under defense co-production agreements.[332]

Section 5(f) sets forth numerous other grounds for Presidential exceptions from the imposition of sanctions. In the case of government procurement of non-defense related products, the President may provide for an exception for goods of any foreign country or instrumentality as provided pursuant to the Trade Agreements Act of 1979.[333] Products, technology and services provided under contracts entered into prior to the date of publication of the name of the sanctioned person in the *Federal Register* are also excepted from the application of sanctions.[334] Sanctions also may not be applied to contracts for spare and components parts, information and technology essential to U.S. products or production.[335] Additionally, sanctions are not required to be imposed upon contracts for the routine servicing and maintenance of products to the extent that alternative sources are not readily or reasonably available.[336] Finally, contracts for medicines, medical supplies and other humanitarian items are exempt from the imposition of sanctions.[337]

Two separate sections of ILSA grant authority to the President to waive the application of sanctions. Section 4(c)(1) provides for the waiver of sanctions by the President with respect to nationals of a country that has agreed to undertake substantial measures that will inhibit Iran's support of international terrorism, development and acquisition of weapons of mass destruction and utilization of its diplomats and representatives to achieve these objectives.[338] The President must notify all appropriate Congressional committees of his intention to grant such a waiver thirty days prior to its effective date.[339] The granting of a waiver pursuant to Section 4(c)(1) also exempts nationals of such countries from application of the enhanced sanctions regime set forth in Section 4(d).[340] The President may also waive the initial or continued imposition of sanctions thirty days or more after determining and certifying to Congress that the waiver is in the national interest of the United States.[341] The President must provide "a specific and detailed rationale" for this waiver.[342] In this regard, the President's certification to Con-

331. *See id.* § 5(f)(1)(B).
332. *See id.* § 5(f)(1)(C).
333. *See id.* § 5(f)(2). *See also* Trade Agreements Act of 1979, 19 U.S.C. §§ 2518(4)(A)-(D), 2511 (b)(1)-(4) (1994).
334. *See* ILSA, § 5(f)(3).
335. *See id.* § 5(f)(4)-(6).
336. *See id.* § 5(f)(4)(C).
337. *See id.* § 5(f)(7).
338. *See id.* § 4(c)(1).
339. *See id.* § 4(c)(2).
340. *See id.* § 4(d)(1). *See also supra* notes 304-06 and accompanying text.
341. *See* ILSA, § 9(c)(1).
342. *See id.* § 9(c)(2).

gress must contain a description of the conduct at issue and U.S. efforts to obtain the cooperation of the government exercising jurisdiction in the case of a foreign person.[343] In addition, the report must provide an estimate as to the significance of the conduct at issue to Iran's ability to develop its petroleum resources and contain a statement as to the likely U.S. response to future conduct by the sanctioned person in contravention of the Act.[344]

Finally, Section 9(a) of ILSA establishes circumstances when the President may delay the imposition of sanctions. If the President determines that sanctions are appropriate pursuant to Section 5(a), he is instructed to immediately initiate consultations with the government exercising primary jurisdiction over the sanctioned person regarding the basis for his decision.[345] In order to increase the likelihood of a successful conclusion to these consultations, the President may delay the imposition of sanctions for up to ninety days.[346] Following the conclusion of such consultations, the President must immediately impose sanctions unless he determines and certifies to Congress that the government possessing primary jurisdiction over the sanctioned person has taken "specific and effective actions" to resolve U.S. concerns.[347] These actions may include the imposition of appropriate sanctions by the foreign government in order to terminate the prohibited involvement of the sanctioned person in Iran.[348] If the foreign government initiates such "specific and effective actions," the President may suspend the implementation of sanctions for an additional ninety days upon further certification to Congress.[349] In any event, the President is required to submit a report to the appropriate Congressional committees on the status of consultations with foreign governments and the basis for any delays within ninety days of the decision to impose sanctions pursuant to Section 5(a).[350]

Sanctions may also terminate as a result of Iran's actions or by operation of law. Section 8(a) provides for the termination of sanctions when ILSA's objectives are met. Two separate determinations must be made in order for ILSA's objectives to be deemed to have been met. First, the President must determine and certify to Congress that Iran has ceased its efforts to manufacture or acquire weapons of mass destruction.[351] Second, the President must certify to Congress that Iran

343. *See id.* § 9(c)(2)(A)-(B).
344. *See id.* § 9(c)(2)(C)-(D).
345. *See id.* § 9(a)(1).
346. *See id.* § 9(a)(2).
347. *See id.*
348. *See id.*
349. *See id.* § 9(a)(3).
350. *See id.* § 9(a)(4).
351. *See id.* § 8(a)(1)(A)-(C). Included within the term "weapons of mass destruction" are nuclear, chemical and biological weapons as well as ballistic missiles and related launch technology. *Id.*

has been removed from the list of countries providing sponsorship and support for international terrorism compiled pursuant to Section 6(j) of the Export Administration Act of 1979.[352] If these two conditions are satisfied, the President is released from his obligation to impose sanctions.

Sanctions may also terminate by operation of law. Section 9(b)(1) provides that sanctions shall remain in effect for a period of not less than two years from the date of their imposition.[353] Alternatively, sanctions may be lifted if the President certifies to Congress that the sanctioned person has ceased to engage in the activities which led to their imposition.[354] However, the President must receive "reliable assurances" that the sanctioned person will not knowingly make prohibited investments in Iran in the future.[355] Even if the President makes these determinations, the sanctions must remain in effect for at least one year.[356] In any event, Section 13(b) provides that ILSA shall cease to be effective five years from the date of its enactment.[357]

IV. THE IRAN AND LIBYA SANCTIONS ACT: SERVING U.S. INTERESTS?

Despite its purported purposes of serving the national security interests of the United States and moderating Iranian behavior through multilateral political pressure and unilateral economic sanctions, ILSA does not serve U.S. international and national interests. The Act is inconsistent with the U.S.'s long-standing opposition to secondary boycotts and jeopardizes the leadership role of the United States in international affairs. Further, the isolationist policy toward Iran expressed in the Act will fail without the cooperation of the international community. In addition, the Act serves to exclude American companies from significant portions of the lucrative Middle Eastern oil and gas industries and subjects such companies to the threat of foreign retaliation. The Act may also serve to discourage reform in Iran by fostering continued hostility toward the United States and stoking Iranian nationalism. Finally, the Act minimizes potential American influence upon future events in Iran.

Initially, ILSA is inconsistent with the long-standing opposition of the United States to secondary boycotts.[358] For example, in 1950, the

352. *See id.* § 8(a)(2). *See also* Export Administration Act of 1979, 50 U.S.C. app. § 2405(o) (1998).

353. *See* ILSA, § 9(b)(1).

354. *See id.* § 9(b)(2).

355. *See id.*

356. *See id.*

357. *See id.* § 13(b). Congress concluded that "[f]ive years is adequate time to gauge its effectiveness at achieving [Congress'] objectives." H.R. REP. NO. 104-523(II), at 19 (1996). Congress will reevaluate ILSA's provisions at the end of five years based upon Iran's behavior and ILSA's perceived effectiveness. *See id.*

358. A "secondary boycott" consists of restrictions upon international trade directed at

Arab League Council, the executive branch of the Arab League,[359] recommended that member states compile a blacklist of third country ships that carried Jewish immigrants or military cargo to Israel.[360] The boycott was subsequently expanded to include all firms making a "material contribution to the strength of Israel."[361] "Material contributions" were defined as the establishment of plants in Israel, the use of an agent or principal office located in Israel and actions taken to develop Israel's natural resources.[362] Entry into a partnership with an Israeli company, holding shares of an Israeli company, supplying advice or technical assistance to Israeli manufacturing plants and permitting an Israeli company to use the name or trademarks of a foreign company were also defined as "material contributions."[363] The armaments, tourist, petroleum, insurance and banking industries were excepted from the boycott.[364] Non-Israeli companies engaging in these activities were prohibited from doing business with members of the Arab League or companies located therein.[365] The United States opposed the boycott on the bases that it targeted an important ally and violated international law.[366] ILSA is completely contrary to this policy of active opposition to secondary boycotts.

ILSA also jeopardizes the leadership role of the United States in international affairs and institutions. For example, in 1993, the United States implemented the North American Free Trade Agreement (NAFTA) with two of its largest trading partners, Canada and Mexico.[367] Article 301 of Chapter Three of NAFTA requires the United States, Canada and Mexico to accord national treatment to each other's

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one country as well as other countries and businesses located therein doing business and maintaining relations with the primary target of the boycott. *See* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 951-52 (2d ed. 1986).

359. The Arab League was organized in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and Yemen.

360. *See* NORMAN VANDER CLUTE, LEGAL ASPECTS OF THE ARAB BOYCOTT 12 (1977).

361. *Id.* at 16. *See also* EDWARD HOTALING, THE ARAB BLACKLIST UNVEILED 18-26 (1977).

362. *See* VANDER CLUTE, *supra* note 360, at 16-17.

363. *See id.* at 16.

364. *See id.* at 17. Exceptions to the boycott are permitted where the "higher interests of an Arab state require them." *Id.*

365. The resolutions of the Arab League have no legal force and effect until League member states adopt internal laws and procedures implementing the resolutions. As such, there is considerable variance among Arab states with regard to the boycott, and each state maintains its own rules with regard to the enforcement of the boycott within its territory.

366. *See* HOTALING, *supra* note 361, at 18-26. *See also* Lippman, *supra* note 18, at A1.

367. *See* North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301-473 (1994).

goods in accordance with Article III of GATT.[368] In this regard, Article 301 of NAFTA incorporates by reference GATT's national treatment provisions.[369] NAFTA defines "national treatment" as "treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party which it forms a part."[370]

Exceptions to the requirement of national treatment are governed by Chapters Eight and Twenty-One of NAFTA. Article 802 of Chapter Eight of NAFTA incorporates the emergency actions provisions of Article XIX of GATT.[371] Chapter Twenty-One of NAFTA incorporates Article XX of GATT setting forth general exceptions to the contracting parties' obligations. Specifically, Article 2101(1) of NAFTA provides, in part, that "[f]or purposes of . . . [t]rade in [g]oods . . . GATT Article XX and its interpretive notes . . . are incorporated into and made a part of this Agreement."[372] Additionally, Article 2102(1) of NAFTA provides for an

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368. *See* North American Free Trade Agreement, Dec. 8-Dec. 17, 1992, ch. 3, art. 303(1), 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]. Article 303(1) specifically provides, in part, that "[e]ach Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretive notes." *See id.*

369. *See id.* Article III, § 2 of the General Agreement on Tariffs and Trade provides in part that, "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, A-18, 62 U.N.T.S. 82 [hereinafter GATT]. In addition, Article III, § 4 of GATT provides in part that:

> [t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Id. art. III, § 4.

370. NAFTA, *supra* note 368, ch. 3, art. 301, § 2.

371. Article 802, § 1 of NAFTA provides in part that, "[e]ach Party retains its rights and obligations under Article XIX of GATT." *Id.* ch. 8, art. 802, § 1. Article XIX, § 1, cl. a of GATT provides in part that:

> [i]f, as a result of unforeseen developments . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free . . . to suspend the obligation in whole or in part or to withdraw or modify the concession.

GATT, *supra* note 369.

372. NAFTA, *supra* note 368, ch. 21, art. 2101, § 1. Article XX of GATT provides in part that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: necessary to protect public morals; necessary to protect human, animal or plant life or health; relating

exception for the maintenance of national security.[373]

However, Section 6(6) of ILSA provides that one of the penalties which the President may impose is a restriction upon imports.[374] This penalty violates the national treatment provisions of Article 301 of NAFTA. Goods originating from foreign persons deemed by the President to have knowingly made investments in excess of $40 million in any twelve month period that directly and significantly contributed to Iran's ability to develop its petroleum resources may be absolutely and completely excluded from the U.S. marketplace. Although U.S. companies are subject to broad prohibitions upon conducting business with Iran, they are not subject to the same punishment as foreign firms deemed to have improperly invested in Iran, specifically, the absolute exclusion of their products from the U.S. marketplace. As a result, ILSA violates the national treatment provisions of NAFTA by granting an unfair advantage to U.S. goods through the exclusion of goods originating from sanctioned persons.

Section 6(6) requires that any restriction which the President places upon imports must comply with the provisions of IEEPA. In order to invoke this Act, the President must find that there exist "unusual and extraordinary threats to the national security, foreign policy or economy of the United States."[375] Any restriction upon imports imposed by the President pursuant to ILSA must also comply with Article 2102 of NAFTA which relates to national security exceptions. However, all

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> to the importation or exportation of gold or silver; necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . ; relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources . . .; involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry . . . as part of a governmental stabilization plan . . .; essential to the acquisition or distribution of products in general or local short supply. . . .

GATT, *supra* note 369.

373. *See* NAFTA, *supra* note 368, ch. 21, art. 2102. Article 2102 provides in part that: nothing in this Agreement shall be construed :

> to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests relating to . . . transactions in . . . goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or security establishment, taken in time of war or other emergency in international relations, or relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

NAFTA, *supra* note 368.

374. *See* ILSA, Pub. L. No. 104-172, § 6(6), 110 Stat. 1541, 1546 (1996).

375. IEEPA, 50 U.S.C. § 1702(a) (1998).

but two of the national security exceptions set forth in Article 2102 are inapplicable to import restrictions which may be imposed pursuant to ILSA. Specifically, the import restrictions which may be imposed pursuant to ILSA do not relate to trafficking in armaments[376] and nuclear weapons.[377] Additionally, any such restrictions would not be designed to prevent Canada or Mexico from violating their obligations to maintain international peace and security pursuant to the United Nations Charter.[378]

Such import restrictions may come within the exception permitting restrictions to prohibit the direct or indirect supplying of military or other security establishments.[379] However, utilization of this provision to support restrictions imposed upon imports as a result of investments by foreign persons in Iran's oil and gas industries is weak absent overwhelming evidence that revenues derived by Iran from these industries are flowing directly to the military or other related institutions. Sanctions imposed in the absence of such evidence serve to criminalize all economic activity which results in revenues which may be used by the Iranian government for military purposes.

The other NAFTA provision which may support import restrictions imposed pursuant to ILSA permits restrictions imposed in time of an "emergency in international relations."[380] However, it is unclear whether the definition of "international emergency" contained within NAFTA is identical to that contained within IEEPA such that all "international emergencies" declared pursuant to IEEPA would automatically constitute emergencies pursuant to NAFTA. In any event, it cannot be argued in good faith that NAFTA's national security exception was intended to permit a declaration of emergency lasting nineteen years as has been the case regarding U.S.-Iranian relations. Such an interpretation by the United States would constitute a perversion of the intended meaning of the term "international emergency" and would permit the national security exception to swallow NAFTA's free trade provisions wholesale.

NAFTA also contains provisions regarding government procurement. Specifically, the United States, Canada and Mexico granted national treatment to each other's goods and service suppliers in matters of government procurement pursuant to Article 1003.[381] In addition to

376. *See* NAFTA, *supra* note 368, ch. 21, art. 2102, § 1, cl. b(i).
377. *See id.* ch. 21, art. 2102, § 1, cl. b(iii).
378. *See id.* ch. 21, art. 2102 § 1, cl. c.
379. *See id.* ch. 21, art. 2102, § 1, cl. b(i).
380. *Id.* ch. 21, art. 2102, § 1, cl. b(ii).
381. *See id.* ch. 10, art. 1003, § 1, cl. a-b. Article 1003 provides in part that:
> [w]ith respect to [government procurement] . . . each Party shall accord to the goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to: (a) its own goods and suppliers; and (b) goods and suppliers of another Party.

the national emergency exception set forth in Article 2102(1), Article 1018 provides for exceptions to national treatment in the field of government procurement on the bases of essential security interests [382] and the protection of public safety and morals, human, animal or plant life or health and intellectual property.[383] However, Section 6(5) of ILSA permits the President to prohibit the U.S. Government from procuring, or entering into any contract for the procurement of, any goods or services from a sanctioned person.[384] There are no factual or procedural requirements which the President must meet prior to the imposition of this sanction other than a determination that the sanctioned person knowingly made an investment in Iran's oil and gas industries in an amount in excess of that permitted by law. Section 6(5) of ILSA violates Article 1003(1) as it fails to treat sanctioned foreign persons in the same manner as U.S. persons who would be subject to the procedures and protections afforded in a federal debarment proceeding prior to the imposition of such a penalty.[385]

Furthermore, the exceptions set forth in Articles 1018(1) and 2102(1) are inapplicable. Initially, the essential security interests exception contained within Article 1018(1) is inapplicable as it only grants an exception for government procurement of goods essential for national security or defense purposes. Procurement sanctions imposed pursuant to Section 6(5) of ILSA are not imposed to protect domestic producers of goods essential to the defense of the United States but, rather, are imposed in retaliation for investments by foreign persons in a long-standing enemy of the United States. The national emergency exception set forth in Article 2102(1) is equally inapplicable as it is unclear whether an international emergency deemed to exist under U.S. law is sufficient to support the adoption of emergency measures pursuant to NAFTA. In any event, as set forth above, it can not be contended in good faith that the national security exceptions contained within

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See id. This national treatment requirement applies to contracts with federal governmental entities in excess of $50,000 for goods and services and $6.5 million for construction services. *See id.* ch. 10, art. 1001, § 1, cl. c(i). For governmental enterprises, these amounts are $250,000 and $8 million respectively. *See id.* ch. 10, art. 1001, § 1, cl. c(ii).

382. *See id.* ch. 10, art. 1018, § 1. Article 1018(1) provides, in part, that a party may deviate from NAFTA's government procurement requirements when it is "necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes." *See id.*

383. *See id.* ch. 10, art. 1018, § 2, cl. a-c. Article 1018, § 2 also provides for an exception to NAFTA's government procurement requirements for goods and services of handicapped persons, philanthropic institutions and prison labor. *See id.* ch. 10, art. 1018, § 2, cl. d.

384. *See* ILSA, Pub. L. No. 104-172, § 6(5), 110 Stat. 1541, 1546 (1996).

385. *See* 31 U.S.C. §§ 6101-6106 (1994). *See also* Exec. Order No. 12, 549, 3 C.F.R. 189 (1987); Exec. Order No. 12, 689, 3 C.F.R. 235 (1989), *reprinted in* 31 U.S.C. § 6106.

NAFTA may be interpreted to encompass an international emergency declared by only one country in the entire world for an unbroken nineteen year period.

ILSA also poses a threat to U.S. leadership in GATT and the WTO. In 1994, the United States ratified the Uruguay Round of multilateral trade negotiations pursuant to GATT. Among its many provisions, the Uruguay Round created the WTO. The Uruguay Round delegated to the WTO the duty of enforcement of member states' obligations pursuant to GATT.[386] With regard to imports, these obligations include those set forth in Article III which requires that contracting parties accord national treatment to each other's goods.[387] Exceptions to national treatment are set forth in Articles XIX, XX and XXI. Article XIX permits the implementation of temporary emergency measures in the event of unforeseeable import surges which cause or threaten to cause serious injury to domestic producers.[388] Article XX sets forth a wide range of circumstances which justify the imposition of measures in deviation from the requirements of GATT.[389] Finally, Article XXI provides for an exception to GATT for national security purposes.[390]

The import sanction provided for in Section 6(6) of ILSA violates Article III of GATT for the same reason it violates Article 301 of NAFTA. Furthermore, none of the exceptions provided in Article XXI of GATT are applicable. Article XXI's exceptions for confidential information, fissionable materials, armaments and compliance with the United Nations Charter do not provide justification for ILSA's import sanction.[391] The only possibly applicable exception is that provided for actions taken in times of an emergency in international relations.[392] However, it is unclear whether the definition of "international emergency" contained within GATT is identical to that contained within the IEEPA. Furthermore, as stated above, Article XXI's national security exception

386. *See* Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1144 (1994).

387. *See supra* note 369 and accompanying text.

388. *See supra* note 371 and accompanying text.

389. *See supra* note 372 and accompanying text.

390. Article XXI of GATT provides in part that:

> [n]othing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials . . . (ii) relating to the traffic in arms . . . (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT, *supra* note 369, art. XXI.

391. *See id.*

392. *See id.* art. XXI(b)(iii).

was not intended to support a unilateral declaration of an international emergency lasting nineteen years.

U.S. obligations pursuant to GATT also include those set forth in the Agreement on Government Procurement.[393] The provisions of GATT's Agreement on Government Procurement is almost identical to that set forth in the previously-cited sections of NAFTA. Article III of this Agreement requires that contracting parties grant national treatment to products, services and suppliers originating from all other contracting parties.[394] Article XXIII of the Agreement creates exceptions to its national treatment requirement for essential security purposes[395] and the protection of public morals and safety, human, animal and plant life and health and intellectual property.[396] The procurement sanction set forth in Section 6(5) of ILSA violates the Agreement on Government Procurement for the identical reason it violates Article 1003(1) of NAFTA.[397] Furthermore, the national security exception set forth in Article XXIII of the Agreement on Government Procurement

393. *See* Agreement on Government Procurement (1994) (visited Sept. 17, 1998) <http://www.wto.org/wto/govt/agreem.html>.

394. Article III(1) of the Agreement on Government Procurement provides in part that:

> [w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: that accorded to domestic products, services and suppliers; and that accorded to products, services and suppliers of any other Party.

Id. art. III(1)(a)-(b). This national treatment requirement applies to contracts with U.S. federal governmental entities in excess of 130,000 Special Drawing Rights (SDR) for goods and services and five million SDR for construction services. *See id.* Annex 1. These amounts are 355,000 and five million SDR for sub-central governmental entities and 250,000 and five million SDR for all other public enterprises or authorities which procure in accordance with the Agreement. *See id.* Annexes 2 and 3. Special Drawing Rights are an international reserve asset used as the International Monetary Fund's official unit of account. Its value is based on a trade-weighted basket of major currencies. *See* U.S. GENERAL ACCOUNTING OFFICE, 2 THE GENERAL AGREEMENT ON TARIFFS AND TRADE: URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 155, n. 29 (1994). One SDR was equal to U.S.$1.37 at the time of preparation of this article. *See* Agreement on Government Procurement, *supra* note 393, at Annex 1.

395. Article XXIII(1) of the Agreement on Government Procurement provides that:

> [n]othing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or national defense purposes.

Agreement on Government Procurement, *supra* note 393, art. XXIII(1).

396. Article XXIII(2) of the Agreement on Government Procurement provides, in part, that "nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property." *Id.* art. XXIII(2). Article XXIII also permits exceptions to national treatment for products or services of handicapped persons, philanthropic institutions and prison labor. *See id.*

397. *See supra* note 385 and accompanying text.

does not provide justification for ILSA's procurement sanction for the same reasons set forth with regard to Articles 1018(1) and 2102(1) of NAFTA.

The United States received negative reactions to these potential violations of NAFTA and GATT from Canada and the European Union. As previously noted, Canada amended its Foreign Extraterritoriality Act to provide for fines or prison terms for company managers who comply with orders entered pursuant to ILSA.[398] The European Union filed a formal protest to ILSA with the United States on August 8, 1996.[399] European Union officials warned the United States that the imposition of sanctions against European firms transacting business in Iran would seriously damage relations and could lead to the enactment and enforcement of retaliatory measures against American business interests.[400] The European Union also threatened to initiate a challenge to ILSA before the WTO.[401] Representatives of the United States and the European Union immediately entered into discussions to resolve their dispute regarding the compatibility of ILSA with GATT.[402] Although the negotiators failed to meet their self-imposed deadline of October 15, 1997 for resolution of the dispute, the parties agreed to continue discussions.[403] As part of this agreement, the European Union agreed to refrain from filing a complaint with the WTO as long as the United States refrained from imposing sanctions upon European firms pursuant to ILSA.[404] Discussions between the United States and the European Union are ongoing at the time of preparation of this article.[405]

The very existence of the dispute over the compatibility of ILSA with GATT is not in and of itself troubling.[406] Trade disputes between countries arise and are resolved on a routine basis in this era of global commerce. The troubling aspect of this dispute is the potential Ameri-

398. *See supra* note 28 and accompanying text.

399. *See U.S. Law Punishing Foreign Firms Draws Fire from EU,* CHI. TRIB., Aug. 9, 1996, *available in* 1996 WL 2698903.

400. *See* Blustein, *supra* note 6.

401. *See* Casert, *supra* note 33.

402. *See* Raf Casert, *EU, U.S. Fail to Settle Trade Dispute Over Cuba, Libya, Iran,* ASSOC. PRESS, Oct. 15, 1997, *available in* 1997 WL 2555359.

403. *See id.*

404. *See id.*

405. U.S. representatives have indicated that exemptions could be granted to companies based in European Union countries if such countries adopted measures demonstrating support for U.S. efforts to contain Iran other than ILSA. *See* Lippman, *supra* note 246, at A1.

406. But see Casert, *supra* note 32, wherein Sir Leon Brittan, the European Union's chief trade negotiator, warned that ILSA "creates tension between Europe and the United States which makes it more difficult to work together to achieve shared political objectives in Iran." *Id.* See also Archie M. Bolster, *The Way to Win in Iran,* WASH. POST, Nov. 10, 1997, at A20, wherein the author states that "continued emphasis on sanctions against Iran involving punishment of foreign firms that trade there . . . would bring about [unfortunate] 'tensions with allies and strategic partners.'"

can reaction to any complaint which the European Union may file with the WTO challenging ILSA. In response to a complaint filed by the European Union challenging the compatibility of the Cuban Liberty and Democratic Solidarity Act of 1996[407] with GATT, the Clinton Administration stated that the WTO was an inappropriate forum for the resolution of political disputes such as exist with regard to U.S. policy toward Cuba,[408] and the decision to proceed with such a case would pose "serious risks" for the future of the WTO.[409] As such, the Clinton Administration announced its intention to boycott any hearing held upon the European Union's complaint.[410]

As noted by the WTO Director-General Renato Ruggiero, the WTO dispute panel procedure is "the only rules-based system with enforcement capacity" in the field of international trade.[411] An American decision not to comply with an adverse decision of a dispute panel which may be formed to review ILSA could undermine the effectiveness of the WTO.[412] A potential U.S. challenge to the formation of such a panel could undermine GATT's dispute resolution procedures, deny the WTO institutional credibility and render the institution moribund.

The inconsistent use and application of boycotts by the United States also threatens its leadership role in international affairs. For example, the United States maintains an embargo against North Korea but nevertheless has provided it with aid in the form of food.[413] Further, the United States has, in the past, imposed or threatened to impose sanctions against countries engaged in human rights violations but, at the same time, has ignored equally egregious violations in other countries. For example, the United States imposed sanctions against South Africa in protest of its policy of apartheid but elected to ignore human rights violations in Guatemala, the Dominican Republic and South Ko-

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407. *See* Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091 (1996). Otherwise known as the Helms-Burton Act after its chief legislative sponsors, the Act imposes numerous sanctions upon foreign companies transacting business in Cuba utilizing personal and real property expropriated from Americans by the Castro regime including civil liability in U.S. federal courts and the exclusion of such persons from the United States. *See id.* §§ 6082, 6091.

408. *See* Slobodan Lekic, *U.S. Refuses to Recognize Trade Dispute Panel on Cuba,* ASSOC. PRESS, Feb. 20, 1997, *available in* 1997 WL 4856941.

409. *Id.*

410. *See* Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel; Move Escalates Fight with European Union Over Cuba Sanctions,* WASH. POST, Feb. 21, 1997, at A1, *available in* 1997 WL 9335994.

411. *See* Elizabeth Wise, *EU Plans New Attack on U.S. Laws,* USA TODAY, Oct. 17, 1996, *available in* 1996 WL 2072282.

412. *See id.* Julius Katz, a former deputy U.S. trade representative, has characterized the U.S. announced position to boycott the dispute resolution panel proceeding as one which "runs a major risk of tearing down the WTO." *See* Blustein & Swardson, *supra* note 410.

413. *See* Donald L. Losman, *A Look at . . . The Case Against Sanctions: Good Intentions Gone Bad; Punitive Trade Embargoes are Appealing But They Don't Achieve our Goals,* WASH. POST, Oct. 6, 1996, at C3.

rea.[414] The abandonment of sanctions against the Peoples' Republic of China imposed after the Tienanmen Square massacre in favor of a policy of "critical dialogue" is another example of the inconsistency of U.S. sanctions policy.[415]

The use of sanctions by the United States in the Middle East has also been plagued by inconsistency. Perhaps the best recent example of this inconsistency is U.S. policy towards Sudan. In April 1996, President Clinton signed the Antiterrorism Act of 1996 into law.[416] Section 321(a) of the Act bars Americans from engaging in financial transactions with governments on the U.S. list of states accused of supporting international terrorism.[417] Sudan is included on this list due to its active support of Islamic extremist groups and harboring of terrorists.[418] Nevertheless, on August 23, 1996, the Treasury Department granted an exemption to Occidental Petroleum Corporation permitting it to join Canada's Arakis Energy Corporation in the development of fields in southern Sudan containing an estimated 3.5 billion barrels of oil.[419] The Clinton Administration's attempt to distinguish between the exemption granted to Occidental and U.S. policy toward Iran was factually deficient.[420] Although Occidental was subsequently excluded from partici-

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414. *See id.* Other potential targets of unilateral American sanctions include Indonesia, Nigeria, Pakistan and Turkey based primarily on these countries' abysmal human rights records. *See* Paul Blustein, *Burma Campaign Has Business Fighting Trend Toward Sanctions*, WASH. POST, Mar. 4, 1997, at C1, *available in* 1997 WL 9337742. The United States presently maintains a trade embargo, export or import restrictions or other forms of economic sanctions on seventy-three countries. This proliferating use of economic sanctions has been credited with "creating regulatory chaos, confusion about objectives, strains in relations with allies and sometimes counterproductive responses - often without achieving the purpose for which the sanctions were designed." *U.S. Rethinking Economic Sanctions; State Dept. Team Weighs Costs, Impact of Trade Restrictions*, WASH. POST, Jan. 26, 1998, at A6, *available in* 1998 WL 2464160.

415. *See* Losman, *supra* note 413, at C3. *See also* Barry Schweid, *Albright Asks EU to Curb Trade*, ASSOC. PRESS, Apr. 28, 1997, *available in* 1997 WL 4863925.

416. *See* Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. § 2332 (1994).

417. Section 321(a) of the Antiterrorism and Effective Death Penalty Act of 1996 provides in part that:

> [e]xcept as provided in regulations issued by the Secretary of Treasury, in consultation with the Secretary of State, whoever, being a United States person, knowing or having reasonable cause to know that a country is designated under section 6(j) of the Export Administration Act . . . as a country supporting international terrorism, engages in a financial transaction with the government of that country, shall be fined under this title, imprisoned for not more than 10 years or both.

Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. § 2332d(a) (1994).

418. Sudan has been described as trailing only Iran as a training ground for Islamic extremists involved in attacks upon pro-U.S. interests in the Middle East such as the attempted assassination of Egyptian president Hosni Mubarak in Addis Ababa, Ethiopia in June 1995. *See* David B. Ottaway, *U.S. Eased Law on Terrorism to Aid Oil Firm; Exemption Let Occidental Seek Major Deal in Sudan*, WASH. POST, Jan. 23, 1997, at A1.

419. *See id.*

420. State Department officials defended the exemption on the existence of relations

pation in this project by the Sudanese Government in November 1996, the Treasury Department's waiver may establish a precedent for U.S. companies seeking to conduct business in similarly-listed countries in the future.[421]

Recent U.S. policy toward Iran is plagued with this same inconsistency. Despite the characterization of current Iranian policies as a serious threat to U.S. national security interests, ILSA fails to sanction existing investments in Iran[422] and requires artificially high levels of investment before penalties may be triggered.[423] ILSA is also rife with provisions granting exceptions, waivers and delays from the imposition of penalties.[424] Perhaps most instructive is the complete failure of the Clinton Administration to utilize ILSA against a single foreign firm. Furthermore, despite the existence of ILSA's sanctions regime and growing American concerns about Iran's influence in Europe, the Middle East and central Asia, the United States failed to condemn Iranian violations of the Bosnian arms embargo[425] and welcomed Iranian efforts to negotiate an end to ongoing hostilities in Afghanistan.[426]

The use of sanctions similar to those contained within ILSA presents a "slippery slope" for the current and future administrations. At the time of his signature of ILSA, President Clinton failed to clearly articulate when sanctions are a legitimate tool of U.S. foreign policy.[427] In

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between the United States and Sudan and the absence of such relations with Iran. *See id.* However, Sudan is a close ally of Iran, actively supports Islamic extremist causes and, according to a spokesman for the State Department's Office of Counter-Terrorism, has not ceased its support of acts of international terrorism since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. *See id.*

421. *See id.* Representative William McCollum (Republican, Florida) characterized the exemption as a violation of Congress' intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 and a potential precedent for American companies seeking exemptions from future administrations. *See id.*

422. *See* ILSA, Pub. L. No. 104-172, § 5(a), 110 Stat. 1541, 1546 (1996).

423. *See id* §§ 4(d)(1), 5(a).

424. *See id.* §§ 4(c), 5(f), 9(a), 9(c).

425. *See U.S. Warned of Iran Efforts to Build Influence in Bosnia*, CHI. TRIB., Nov. 28, 1997, at 11, *available in* 1997 WL 3615309. Iran is alleged to have supplied hundreds of millions of dollars of weapons to Bosnia during its war with Serbia. *Id.*

426. *See Busy are the Peacemakers*, WASH. POST, Jan. 9, 1998, at A27. Iran is part of the so-called "Six Plus Two" seeking to broker a peace agreement amongst the warring factions in Afghanistan. The other members of the group are the United States, Russia, Pakistan, Turkmenistan, Uzbekistan, Tajikistan and the Peoples' Republic of China. *Id. See also* Barbara Crosette, *U.S., Iran Talk Relations Show Signs of Thaw; Washington Works with Tehran to End Afghans' Civil War*, CHI. TRIB., Dec. 15, 1997, at 3, *available in* 1997 WL 16808162. State Department official Karl Inderfurth stated that "[the United States is] hopeful that the Iranians will play a constructive role in bringing their influence to bear to see the fighting stop and negotiations begin for the establishment of a broad-based government in Afghanistan." *Id.*

427. *See* Clay Chandler, *U.S. Expects Furor Over Trade Sanctions at Summit*, WASH. POST, June 27, 1996, at A20.

order to address this uncertainty, on January 7, 1998, the Clinton Administration announced guidelines governing the utilization of economic sanctions by the United States.[428] These guidelines provided, in part, that the United States should only resort to sanctions after the failure of other diplomatic options.[429] Additionally, international support and participation should be sought prior to undertaking unilateral measures.[430] Finally, the guidelines provide that sanctions should be carefully designed to avoid unnecessary hardships to innocent parties.[431]

ILSA violates several of these guidelines. Initially, although the Clinton Administration as well as its predecessors attempted to persuade U.S. allies such as the member states of the European Union to discontinue their policy of "critical dialogue" with the Iranian government, there is no evidence that the United States discussed the specific provisions of ILSA with its European allies prior to its enactment. Rather, ILSA provided for such dialogue only after its enactment and prior to the actual imposition of penalties upon foreign firms.[432] There is also no evidence that the Clinton Administration tried the most direct diplomatic option of all prior to the enactment of ILSA - specifically the initiation of dialogue with Iran. Rather, the Clinton Administration and Congress rushed ILSA through the legislative process after the terrorist attack in Dhahran, Saudi Arabia and the downing of Trans-World Airlines Flight 800.[433] Additionally, as previously noted, there is a complete lack of support for ILSA in the community of nations.[434] This lack of support is echoed in the international business community which has continued to conduct business with Iran in a largely unfettered fashion.[435] Finally, the sanctions imposed by ILSA place unnecessary hardships upon innocent third parties. NIOC's qualifications as an innocent third party may be questioned due to the role of the Iranian Government in its ownership and operations. However, foreign persons engaging in good faith business transactions in Iran in strict compliance with their national laws may qualify as innocent third parties.

The U.S. leadership role in international affairs is threatened through the appearance of weakness if the Clinton Administration continues in its failure to impose sanctions pursuant to ILSA. Despite as-

428. *See* Stuart E. Eizenstat, Undersecretary for Economic, Agricultural and Business Affairs, *Remarks before the North American Committee of the National Policy Association* (Jan. 7, 1998) (visited Sept. 13, 1998) <http://www.state.gov/www/policy_remarks/980107_eizen_policyassoc.html>. *See also Sanctions Policy Review,* WASH. POST, Jan. 8, 1998, at A22.

429. Eizenstat, *supra* note 428.

430. *See id.*

431. *See id.*

432. *See supra* notes 267, 345-47 and accompanying text.

433. *See supra* notes 5-7 and accompanying text.

434. *See supra* notes 28-39 and accompanying text.

435. *See supra* notes 219-42 and accompanying text.

surances that it would fully and completely implement ILSA,[436] the Clinton Administration failed to impose sanctions against numerous companies from throughout the world which have invested or agreed to invest billions of dollars in the Iranian oil, gas and petrochemicals industries.[437] These failures, when combined with the Administration's apparent willingness to waive other sanctions legislation as evidenced by its conduct in relation to the Sudan,[438] do not indicate an active enforcement policy during ILSA's remaining three-year term. Every new investment in Iran's oil and gas industries constitutes a "direct challenge" to the policy of Iranian isolation,[439] and every concomitant U.S. failure to impose sanctions "sends a message of weakness to Iran."[440] While the Clinton Administration continues to give lip service to sanctions, Iran continues to develop its oil and gas industries and expand its influence in the Middle East and central Asia.[441] In this regard, Iranian actions speak louder than idle American threats.[442] An effective sanctions policy should grant the executive branch considerable latitude and not have the imposition of sanctions as its sole focus.[443] However, a policy which contains severe penalties that are never imposed is no deterrent at all. The net effect of such a policy is to undermine the credibility of the policymaker.[444]

ILSA also fails to serve the U.S. international interests as it bases American foreign policy on the further isolation of Iran which will fail without the support of the international community. Initially, although politically popular,[445] economic sanctions are generally ineffective as a weapon against unpopular regimes. For example, the United Nations imposed numerous economic sanctions on Saddam Hussein's Iraq subsequent to its invasion of Kuwait in August 1990, but none of these sanctions achieved the goal of forcing an Iraqi withdrawal. Indeed, it has been noted that had the sanctions been given six to twelve months to achieve effectiveness, the Gulf War and the plunder of Kuwait may have been prolonged, Iraqi military positions would have been rein-

436. *See U.S. Sanctions may Backfire on Russia-Iran Oil Deal*, DOW JONES ENERGY SERV., Oct. 16, 1997.

437. *See supra* notes 243-55 and accompanying text.

438. *See supra* notes 416-21 and accompanying text.

439. Lippman, *supra* note 230, at A1.

440. Lippman, *supra* note 252, at A23.

441. *See* IRAN: EIA REPORT, *supra* note 181, at 2, 4 and 11. *See also Iran Economic Overview*, *supra* note 179, at 2.

442. *See Iran Fights Back at U.S. Moves to Isolate It*, WASH. POST, Aug. 9, 1996, at A24.

443. *See* Haass, *supra* note 262, at C9. *See also* Lippman, *supra* note 246, at A1.

444. *See U.S. Ponders Sanctions for Oil Deal in Iran*, *supra* note 219, at A9. *See also U.S. Aides Still Divided Over Sanctions on Foreign Investors in Iran*, *supra* note 258, at A33.

445. Richard N. Haass characterized sanctions as offering "U.S. policymakers and members of Congress an attractive compromise between doing nothing and sending in the Marines." Haass, *supra* note 262, at C9.

forced, and the coalition may have fallen apart.[446] Further, Saddam Hussein remains firmly entrenched in power seven years after the end of the Gulf War. Other examples demonstrating the general ineffectiveness of economic sanctions include North Korea and Cuba where dictatorial Communist regimes remain in power despite over forty-six and thirty-six years of U.S. sanctions respectively.[447] The U.S. military, rather than economic sanctions, brought down the dictatorships of Manuel Noriega in Panama and Rauol Cedras in Haiti. Economic sanctions have proven to be "an imprecise and expectably ineffective tool" of American foreign policy.[448]

As specifically applied to Iran, U.S. economic sanctions have an inconsistent record of effectiveness. Although the U.S. sanctions regime has tightened the availability of credit to Iran,[449] depressed the value of it currency[450] and discouraged some foreign investment,[451] it has not achieved the desired effect of wholesale modification of Iranian behavior.[452] Furthermore, it bears to note that other factors such as the absence of favorable terms and the availability of projects in other countries posing fewer risks have contributed to difficulties Iran has experienced in obtaining credit and attracting investments in its oil and gas industries.[453] Despite these difficulties, Iran has "managed to blunt

446. *See* Losman, *supra* note 413, at C3.

447. According to former U.S. Trade Representative Carla A. Hills, unilateral trade sanctions against dictatorial regimes serve only to "impoverish people [without affecting] the tyrant [who] doesn't care about the people." *U.S. Rethinking Economic Sanctions; State Dept. Team Weighs Costs, Impact of Trade Restrictions, supra* note 414, at A6.

448. Georgie Anne Geyer, *Castro Owes Clinton a Thank-You Letter,* CHI. TRIB., Nov. 22, 1996, at 31, *available in* 1996 WL 2729273. *See also Panel Approves Sanctions for Foreign Firms Investing in Iran, supra* note 18, at A1. Lawrence S. Eagleburger, who served as Secretary of State under President George Bush, characterized secondary boycotts as "nuts . . . an exercise in American imperialism . . . [serving only to] get our allies mad at us." Chandler, *supra* note 3, at A20. Additionally, President Clinton recently noted that "automatic sanctions legislation" such as ILSA and the Cuban Liberty and Democratic Solidarity Act of 1996 predicates American foreign policy upon dishonesty by placing "enormous pressure on whoever is in the executive branch to fudge an evaluation of the facts" in order to support a decision to avoid the imposition of sanctions which do not enjoy support in the international community. Michael Kelly, *Foreign Affairs Fudge Factor,* WASH. POST, May 6, 1998, at A19.

449. *See Diplomacy with Iran, supra* note 188, at A16.

450. *See* Rodman, *supra* note 261, at A25.

451. *See supra* notes 215-18 and accompanying text. *See also* IRAN: EIA REPORT, *supra* note 181, at 3.

452. *See* Thomas W. Lippman, *Critics Want U.S. to Reevaluate 'Dual Containment' Policy on Iran and Iraq,* WASH. POST, Dec. 7, 1997, at A33. *See also U.S. Economic Offensive Against Iran's Energy Industry is Bearing Fruit, supra* note 216, at A8. According to the State Department's 1996 report entitled "Patterns of Global Terrorism," Iran remains "the premier state sponsor of international terrorism and is deeply involved in the planning and execution of terrorist acts." David B. Ottaway, *U.S. Considers Slugging it out with International Terrorism,* WASH. POST, Oct. 17, 1996, at A25.

453. *See U.S. Economic Offensive Against Iran's Energy Industry is Bearing Fruit, supra* note 216, at A8.

the worst effects of American sanctions."[454] Iran's gross domestic product and international trade continue to grow, and foreign credit remains available.[455] Additionally, as previously noted, investment in Iran's oil and gas industries is booming.[456] These transactions are substantial with potential investments and revenues totaling several billion dollars. Perhaps most importantly, these investments have emanated from throughout the world, from friend and foe alike as far afield as Europe, Asia and North America.[457] U.S. prospects for blocking future investments and inflicting further damage upon the Iranian economy appear "bleak."[458] As a result, several respected figures in U.S. foreign policy including Zbigniew Brzezinski, Brent Scowcroft and Richard Murphy have called for ILSA's scrapping and gradual reconciliation through the forging of economic ties.[459]

Current U.S. policy also fails to recognize the geopolitical significance of Iran. Encompassing over 600,000 square miles, Iran's location casts it as an important player in Near Eastern affairs.[460] To the north, Iran borders upon the oil-laden Caspian Sea, the new frontier in international petroleum exploration.[461] Iran's northern boundaries also touch upon the central Asian republics of Azerbaijan and Turkmenistan, a contentious area in which the West, Iran and Russia are all jostling for influence.[462] Western attempts to remove these largely landlocked fledging republics from Russia's sphere of influence will not meet with success if they are denied ties to Iran and the Persian Gulf.[463] To the west, Iran borders upon Turkey, a staunch U.S. ally plagued with political unrest and economic upheaval.[464] Iran also shares its western border with Saddam Hussein's Iraq, an international pariah with continuing dreams of expansion to which Iran may serve as a valuable counterweight.[465] Iran's proximity to the Strait of Hormuz to its south grants it a potential chokehold on oil shipments originating in the Per-

454. Bakhash, *supra* note 263, at A27.

455. *See supra* notes 201-06 and accompanying text.

456. *See supra* notes 219-42 and accompanying text.

457. Stuart E. Eizenstat acknowledged that the conflict in policies between the United States and the rest of the world on Iran has created "great complexities in implementing an appropriate sanctions policy." Wright, *supra* note 264, at A1.

458. *U.S. Isolated in Iran Policy,* ASSOC. PRESS, Dec. 6, 1997, *available in* 1997 WL 11923607.

459. *See* Lippman, *supra* note 452, at A33.

460. *See EU Returns Envoys to Iran--with Conditions,* SACRAMENTO BEE, Apr. 30, 1997, *available in* 1997 WL 3285650.

461. *See* James Meek, *China Joins Scramble for Black Gold,* GUARDIAN, Sept. 29, 1997, *available in* 1997 WL 2402872.

462. *See* Ottaway & Morgan, *supra* note 226, at A37.

463. *See* Drozdiak, *supra* note 203, at A15.

464. *See* Couturier *supra* note 232, at A17; Lippman, *supra* note 230, at A1.

465. *See Mr. Khatami's Speech,* WASH. POST, Jan. 17, 1998, at A24. *See also* Thomas L. Friedman, *New U.S. Ties With Iran Would Rattle Saddam,* DENVER POST, Jan. 7, 1998, *available in* 1998 WL 6098418.

sian Gulf.[466] Iran's southern boundaries also place it in uncomfortable proximity to vital U.S. allies in the Gulf such as Saudi Arabia, Kuwait, Bahrain, Qatar and Oman.[467] Finally, Iran's eastern boundaries with Pakistan and Afghanistan provide it with the potential to influence the discordant voices of Islam emanating from these countries as well as blunt growing Chinese efforts to extend its sphere of influence in central Asia.[468] Those countries which choose to overlook or disregard Iran's strategic role in Near Eastern affairs do so at their own peril. In this regard, current U.S. policy on Iran could use a healthy dose of "realpolitik."

In any event, ILSA will not succeed without international cooperation which has not been forthcoming. The State Department has conceded that the response of U.S. allies to ILSA has been "disappointing and lukewarm."[469] The U.S. drive to further isolate Iran is widely perceived by the international community as originating not from concerns regarding terrorism or opposition to the Middle East peace process but, rather, from wounded American pride resulting from the Iranian hostage crisis nineteen years ago.[470] As a result, American efforts to isolate Iran are crumbling. U.S. allies have condemned ILSA[471] while private industry has ignored American pleas to refrain from investing in Iran's oil and gas industries.[472] These policies and U.S. failure to impose sanctions are likely to result in further investment in Iran's oil and gas industries as other foreign companies scramble to avoid exclusion from the market.[473] Such defections, and their likely continuation in the future, have left the United States alone in its attempts to isolate Iran. Tensions arising from these defections may make it more difficult for the United States to work with its allies to attain their shared political objectives in Iran. Ultimately, this tension may also prove fatal to ILSA's success.

International opposition to ILSA is primarily based upon the perceived extraterritorial application of U.S. law.[474] Although they ac-

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466. The Persian Gulf and the surrounding countries account for approximately thirty-one percent of the world's total oil production and have sixty-three percent of the world's proven resources. *See Iran Physical Background: Location* (visited Sept. 16, 1998) <http://www.salamiran.org/Iraninfo/General/Geography>.

467. *See* Fouad, *supra* note 36.

468 *See* Ottaway & Morgan, *supra* note 227, at A1. *See also Deal Tests U.S. Policy on Tehran, supra* note 228, at A1.

469. *See* Rosenfeld, *supra* note 259, at A17. Assistant Secretary of State Martin Indyk conceded that the lack of international support and cooperation with regard to ILSA could prove fatal to the accomplishment of its purposes. *See U.S. Decision on Total Sanctions "Imminent,"* AGENCE FR.-PRESSE, May 14, 1998, *available in* 1998 WL 2281135.

470. *See Sanctions on France, supra* note 258, at A24.

471. *See supra* notes 28-39 and accompanying text.

472. *See supra* notes 219-42 and accompanying text.

473. *See* Christopher Burns, *U.S., E.U. Use Caution Over Total-Iran Natural Gas Deal*, DOW JONES NEWS SERV., Oct. 5, 1997.

474. Hugo Paemen, the European Commission ambassador to the United States, char-

knowledge that the United States is entitled to disagree with their attempts to engage Iran, the international community has balked at ILSA's perceived imposition of American foreign policy on a global scale.[475] This imposition of American will is particularly irksome as it penalizes foreign firms for engaging in commercial activities which are lawful in their home countries.[476] As a result, ILSA has been subject to sharp criticism from U.S. allies. Lionel Jospin, the French foreign minister, scoffed at ILSA's purported extraterritorial reach stating that "[n]obody accepts that the United States can pass a law on a global scale."[477] Germany's foreign minister Klaus Kinkel characterized ILSA as a "reproach [of the European Union] for following its economic interests."[478] Hassan Marican, the President of Malaysia's state-owned oil company Petronas, criticized the Act as an attempt to interfere with his company's right to choose with whom to transact business.[479] Leveling perhaps the strongest criticism of ILSA outside of Iran, South African President Nelson Mandela condemned the United States for its "arrogance [in] dictat[ing] where [the international community] should go or which countries should be our friends."[480] It has been aptly noted that the symbolism which the United States attempts to project through the use of secondary boycotts such as ILSA - "that of a nation standing for high moral principles - is regularly transmuted .... [into a foreign] view [of the United States] as a bully who insists on getting its way."[481] As the German newsmagazine *Der Spiegel* noted in a recent cover story:

> [as] American idols and icons are shaping the world from Katmandu to Kinshasa, from Cairo to Caracas .... [t]he Americans are acting, in the absence of limits put to them by anybody or anything, as if they own a blank check in their 'McWorld.' Strengthened by the end of communism and an economic boom, Washington seems to have abandoned its self-doubts from the Vietnam trauma. America is now the Schwarzenegger of international politics: showing off its muscles, obtrusive, intimidating.[482]

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acterized ILSA as "an extreme case of extraterritorial legislation." Blustein, *supra* note 6, at A25.

475. *See EU Protests Law on Iran, Libya Sanctions*, *supra* note 29.

476. *See* H.R. REP. NO. 104-523(I), at 20 (1996).

477. *U.S. Must Grin and Bear it When Allies Dance with Foes*, ROCKY MTN. NEWS, Oct. 2, 1997, *available in* 1997 WL 6859439. Jospin further stated that, "American laws apply only in the United States. They do not apply in France." *Id.*

478. Drozdiak, *supra* note 203, at A15. *See also EU to Send Ambassadors Back to Iran*, *supra* note 205.

479. *See Petronas says Iran Venture with Total, Gazprom to Continue*, AFX, Nov. 16, 1997, *available in* 1997 WL 18133501.

480. William Drozdiak, *Even Allies Resent U.S. Dominance*, WASH. POST, Nov. 4, 1997, at A1.

481. Losman, *supra* note 413, at C3.

482. Drozdiak, *supra* note 480, at A1.

Such perceptions serve to create international resistance to American foreign policy objectives. Such a perception clearly does not further U.S. international interests.

The response of other countries to ILSA also sets dangerous precedents for their future relations with the United States.[483] A unanimous European Union expressed "deep concern" regarding ILSA's enactment and reserved the right to retaliate against the United States in defense of its economic interests in Iran.[484] Subsequent to the issuance of these threats, the European Union prepared and studied measures for economic retaliation against the United States to be imposed in the event of ILSA's implementation.[485] These measures would bar European companies from complying with American legislation deemed to have an improper extraterritorial effect and place restrictions upon the import of American goods and services.[486] Perhaps more troubling is the possibility of "quiet, carefully targeted reprisals" against American companies.[487] Such retaliation could consist of unofficial attempts to discourage consumption of American imports or the awarding of government contracts to American businesses. These concerns led the European-American Chamber of Commerce to denounce ILSA as "antithetical to U.S. economic interests" and serving to increase the risk of European retaliation which commenced with the enactment of the Helms-Burton Act sanctioning trade with Cuba.[488] Indeed, as Lee H. Hamilton, the ranking Democrat on the House International Relations Committee has noted, the United States has "opened a whole new ball game here . . . [which] could easily come back to bite us."[489]

ILSA also encourages American trading partners to enact similar legislation and, in so doing, perhaps reopen old wounds relating to perceived past injustices. In addition to the previously-noted Arab boycott of Israel,[490] there are several other instances when sanctions similar to

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483. In response to the Clinton Administration's announcement that it would investigate Total's investment in Iran's South Pars natural gas field in September 1997, French Foreign Ministry spokesman Jacques Rummelhardt stated that "the application of [ILSA] would have serious consequences on international trade." *U.S. Investigating Iranian Gas Deal, supra* note 30. *See also U.S. Aides Still Divided Over Sanctions on Foreign Investors in Iran, supra* note 258, at A33.

484. *See* Rick Atkinson, *Divergent Policies Toward Iran Strain U.S.-German Relations*, WASH. POST, June 27, 1996, at A21. *See also U.S. to Investigate Total's Deal with Iran, supra* note 33.

485. *See supra* notes 32-33 and accompanying text.

486. *See* H.R. REP. NO. 104-523(I), at 20 (1996). *See also* IRAN: EIA REPORT, *supra* note 181, at 3.

487. Chandler, *supra* note 3, at A20.

488. Blustein, *supra* note 6, at A25.

489. Chandler, *supra* note 3, at A20. Representative Hamilton called for the resumption of diplomatic relations and initiation of American-Iranian exchange programs in April 1998. Afshin Valinejad, *Tehran's Top Moderate Mayor Freed from Jail by Iran's Top Cleric*, BOSTON GLOBE, Apr. 16, 1998, *available in* 1998 WL 9129233.

490. *See supra* notes 359-66 and accompanying text.

those contained in ILSA could be utilized by other countries to the potential detriment of the United States. For example, the Peoples' Republic of China could place restrictions upon imports, investments and government purchases from countries which maintain commercial relations with Taiwan. These restrictions could be justified on the basis that commercial relations with Taiwan serve to strengthen its economic infrastructure and defense capabilities. Such a result could strengthen Taiwan's status as a "renegade province,"[491] thereby thwarting reunification and presenting a national security risk to the Peoples' Republic of China.

Such legislation could have severe consequences for American industry which trades over $57 billion of goods and services with the Peoples' Republic of China annually.[492] In addition to the loss of current markets, such legislation could also serve to exclude American companies from future business opportunities in the burgeoning Chinese economy.[493] From a political standpoint, the exclusion of the United States from the Chinese economy would greatly reduce any influence the United States could exercise over a government in Beijing eager to flex its growing economic and military might. Such restrictions could also exacerbate the U.S. trade deficit with the Peoples' Republic of China which grew to $33.8 billion in 1995.[494] Nor is such a scenario limited to relations between the Peoples' Republic of China and Taiwan. Any countries with political, economic or military axes to grind such as India and Pakistan could impose such restrictions to discourage trade with its enemies and retard their economic development.

In addition to the threat posed to American business interests by the adoption of retaliatory measures by its trading partners, ILSA also serves to exclude American companies from pursuit of lucrative opportunities in the Middle Eastern oil and gas industries. American companies are not only prohibited from pursuing opportunities worth billions of dollars within Iran but are also excluded from opportunities which

491. The Peoples' Republic of China has never recognized the independence of Taiwan. Rather, the government in Beijing deems Taiwan to be a " breakaway renegade province." U.S. DEPARTMENT OF STATE, TAIWAN: STATE DEPARTMENT NOTES (1995) (visited Sept. 16, 1998) <http://www.state.gov/www/background_notes/taiwan_971100_bgn.html> [hereinafter TAIWAN: STATE DEPARTMENT NOTES].

492. *See* U.S. DEPARTMENT OF STATE, CHINA: STATE DEPARTMENT NOTES (1996) (visited Sept. 16, 1998) <http://www.state.gov/www/background_notes/china_1196_bgn.html> [hereinafter CHINA: STATE DEPARTMENT NOTES]. By contrast, United States-Taiwan trade totaled $48 billion in 1996. *See* TAIWAN: STATE DEPARTMENT NOTES, *supra* note 491, at 3.

493. The World Bank estimates that China's economic output will experience an annual growth rate of eight to ten percent by the year 2000 and will equal $10 trillion annually by the middle of the next century. *See* CHINA: STATE DEPARTMENT NOTES, *supra* note 492, at 3. China's gross domestic product was estimated at $3.39 trillion in 1996 with an annual growth rate of 9.7%. *See World Factbook*, <http://www.washingtonpost.com/worldref/country/china.html>.

494. *See* CHINA: STATE DEPARTMENT NOTES, *supra* note 492, at 3.

have Iranian connections. Furthermore, the sanctions required to be imposed by the President and any retaliation in response thereto may result in lost sales, profits and jobs for American companies. These concerns were noted but ultimately disregarded by Congress in its rush to address concerns regarding international terrorism in the wake of the Khobar Towers bombing and the crash of Trans-World Airlines Flight 800.[495] Indeed, U.S. use of secondary boycotts and stringent economic sanctions such as those contained in ILSA has become "[i]ncreasingly . . . cavalier with scant regard to their actual impact on American interests."[496] Rather, the best chance of modifying Iranian behavior while protecting American business interests abroad may be "to resume arms-length commercial dealings with firms [in Iran] saving demands for the international policy changes by [the Iranian] government for the day when political dialogue can begin."[497]

Furthermore, attempting to fortify the failing policy of economic isolation with extraterritorial penalties which primarily harm our allies will only serve to place American businesses at a greater disadvantage in penetrating the marketplace in a more moderate Iran in the future. Commercial relations simply will not spring up overnight upon the inevitable resumption of diplomatic relations between the United States and Iran. American businesses will find themselves engaged in fierce competition with well-established foreign industries deeply rooted in the Iranian economy. As in Vietnam, American industry will enter the Iranian marketplace with a multiyear competitive disadvantage.

The current American policy towards Iran also fails to recognize the positive influence that private businesses may exert toward encouraging the kinds of behavior that the United States deems appropriate. Although no one would argue that the presence of American businesses in Moscow or Beijing have had a quantifiable positive effect upon international relations and the state of human rights protections in these countries, it remains inescapable that commercial relations bring people of differing cultural and political backgrounds together. This fact has been recognized in diplomatic circles for years, hence the inclusion of

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495. *See* H.R. REP. NO. 104-523(I), at 21 (1996).

496. Haass, *supra* note 262, at C9. *See also* Losman, *supra* note 413, at C3. For example, in April 1998, Mobil Corporation requested that the Clinton administration grant it a license to trade one million barrels of crude oil generated from its operations in the Burun oil field in Turkmenistan for crude oil located in Iranian facilities on the Persian Gulf. *See Mobil Seeks License for Oil Swap with Iran,* WASH. POST, Apr. 24, 1998, at F1. Mobil's partners in the operation, Monument Oil and Gas PLC of the United Kingdom and Burren/VSTT of Bermuda, have utilized such trades with Iran to get crude oil produced from the field to market while Mobil has been required to ship its product by barge across the Caspian Sea at considerable expense. *Id.* Economist Gary Hufbauer estimates that sanctions cost U.S. businesses in excess of $20 billion per year on a global basis. *See A Case for Restraint on Trade Sanctions,* S.F. CHRON., Mar. 8, 1998, *available in* 1998 WL 3908611.

497. Bolster, *supra* note 406, at A20.

trade agreements and commercial exchanges in the process of normalization of relations between countries. Such is the approach toward Iran taken by the more-forward thinking U.S. allies such as the European Union. Although it is unduly optimistic to conclude that an American policy of commercial engagement would instantly abrogate almost twenty years of innate suspicion and overt hostility, it most certainly bodes better for the future of American-Iranian relations than the present policy of stringent economic isolationism.

ILSA may also discourage reform by presenting the Iranian Government with expanded opportunities to appeal to Iranian nationalism through renewed attacks upon the United States. Despite President Khatami's proclamation of a new era for Iran upon his election, the true meaning and implications of his surprising victory remain to be determined.[498] Some analysts hailed Khatami's victory as evidence of an imminent collapse of Iran's particular blend of Islam and politics[499] while others concluded that it raised questions about individual freedom, the rule of law and the role of Islam in daily life.[500] Less idealistic observers noted that Khatami's election was merely a reflection of social realities in a country where fifty percent of the population was born after the Islamic revolution and has a lesser degree of devotion to its tenets.[501] Outwardly, the Clinton Administration exercised great restraint and characterized Khatami's election as a "hopeful development" which it would monitor with "a great deal of interest."[502] What can be concluded with some degree of certainty is that Khatami's election represented a crushing blow to the previously-unchallenged power of the conservative mullahs and their hard-line supporters.[503]

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498. *See* Anwar Faruqi, *Khatami's Victory a New Stage in Battle of Moderate, Hardliners,* ASSOC. PRESS, May 25, 1997, *available in* 1997 WL 4868019.

499. *See Islam's Political Football,* ECONOMIST, Dec. 13, 1997, *available in* 1997 WL 17832709.

500. *See Iran's Vote Sends Unusual Message, supra* note 107.

501. *See* Darius, Bazargan, *Iran: Regime Must Win Over the Youth to Survive,* INTER PRESS SERV., Apr. 15, 1997, *available in* 1997 WL 7074812.

502. *See* John F. Harris, *Clinton 'Hopeful' But Skeptical on New Iranian Leader,* WASH. POST, May 30, 1997, at A27. However, it bears to note that, in August 1997, the Clinton Administration relayed a message to Iran through Swiss diplomatic channels proposing face-to-face discussions between the U.S. and Iranian Governments. *See U.S. Proposed Direct Talks in Overture to Iran,* WASH. POST, Jan. 9, 1998, at A1.

503. *See* Anwar Faruqi, *President-Elect Visits Shrine of Khomeini,* ORANGE COUNTY REGISTER, May 27, 1997, *available in* 1997 WL 7425325. However, other commentators are less optimistic about the Khatami Administration and its purported moderate tendencies. Achraf Pahlavi, the twin sister of Mohammed Reza Pahlavi, the last Shah of Iran, stated that "it is a mistake to see [Khatami's] election [as] a promise of imminent change in Iran." Achraf Pahlavi, *Engaging with Iran is not the Answer,* WASH. POST, Aug. 7, 1997, at A22. Khatami remains an advocate of the Islamic revolution, albeit a more broad-minded advocate than his predecessors. *See* Lancaster, *supra* note 117, at A29. As a result, some commentators have concluded that Iran will not modify its behavior in any significant manner thereby providing justification for the lifting of U.S. economic sanctions. *See also A 'Moderate' in Tehran,* WASH. POST, May 26, 1997, at A18.

Although Iran's conservative clergy have suffered a string of defeats culminating in Khatami's call for dialogue with the United States and the questioning of its legitimacy in governmental affairs, they remain a powerful force.[504] As a result, "a now-scarcely concealed struggle for the future of the Iranian revolution" is occurring between the arch-conservative clerical establishment and moderate supporters of President Khatami.[505] Despite the overwhelming nature of his electoral victory, Khatami's triumph in this struggle is far from assured. The Islamic Consultative Assembly remains firmly in the control of religious conservatives[506] and Khatami's political allies have been subject to attack.[507] Most importantly, Ayatollah Khamenei, the supreme religious leader and highest ranking government official, has strongly rejected Khatami's calls for dialogue with the United States.[508] Iran's media reflect this division of opinion as conservative newspapers condemned any resumption of relations with the United States while other publications characterized Khatami's remarks as a precursor to the resumption of diplomatic relations.[509]

The outcome of President Khatami's initiative defies easy prediction. At the very least, such a dialogue would be a major setback to the conservative clergy and could alter the balance of power in favor of

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504. For example, conservative opponents of President Khatami made gains in parliamentary by-elections held in March 1998. *See Opposition Candidates Gain in Iran*, S.F. CHRON., Mar. 15, 1998, at A-13. *See also* Lancaster, *supra* note 99, at A10; *Iran's New President Breaks Taboo by Re-examining Policy on U.S.*, DES MOINES REGISTER, Jan. 7, 1998, *available in* 1998 WL 3187022.

505. *Mr. Khatami's Speech*, *supra* note 465, at A24. *See also Iran President Backs Tolerance*, ASSOC. PRESS, Apr. 22, 1998, *available in* 1998 WL 6654118; Rossant, *supra* note 93; *Iran: Pro-Khatami Backers Clash With Vigilantes*, *supra* note 93.

506. *See A Leading Hard-line Opponent of Iran's...*, ASSOC. PRESS, May 31, 1998, *available in* 1998 WL 7418612. Ali Akbar Nateq-Nouri, Khatami's major opposition in the presidential election, was re-elected to the speakership of the Assembly by a vote of 211 to 32. *See id.*

507. *See An Air of Optimism in Iran*, *supra* note 180, at A1. In December 1997, the Islamic Consultative Assembly initiated the filing of corruption charges against Gholam Hossein Karbaschi, the mayor of Tehran and a close political ally of Khatami. *See id.* Karbaschi was subsequently detained upon orders from Ayatollah Mohammed Yazdi, the conservative head of the judicial branch. *See Hard-Liners Back Off on Tehran Mayor*, WASH. POST, Apr. 16, 1998, at A23. Karbaschi was released upon bail by order of Ayatollah Khamenei after thousands of his supporters clashed with Iranian riot police in the streets of Tehran in April 1998. *See Ex-Iran Leader Defends Tehran Mayor*, ASSOC. PRESS, Apr. 18, 1998, *available in* 1998 WL 6652839. *See also Tehran Mayor Returns to Work*, ASSOC. PRESS, Apr. 15, 1998, *available in* 1998 WL 6653197.

508. *See supra* note 126 and accompanying text.

509. The conservative newspaper *Jomhuri Islami* rejected any basis for the resumption of dialogue with the United States stating that "[a]ny hands that reach out to America should be cut off." *Iran's New President Breaks Taboo by Re-examining Policy on U.S*, *supra* note 504. However, the conservative *Tehran Times* spoke favorably about the "resumption of diplomatic ties." *See Iranians React Cautiously to Khatami's Offer of Contacts with Americans*, ASSOC. PRESS, Jan. 8, 1998, *available in* 1998 WL 6636633. *See also Iran's Hard-line Press Speaks on Dialogue with Washington*, ASSOC. PRESS, Dec. 17, 1997, *available in* 1997 WL 4897177.

moderate voices in Iran.[510] On the other hand, tougher economic sanctions, including the actual implementation of ILSA, will send a hostile signal to the Khatami Administration, strengthen the position of its opponents and further radicalize Iranian behavior.[511] Such a policy will provide the Iranian Government with further opportunities to demonize the United States and may re-ignite the strident anti-American passions prevalent in the years immediately following the Islamic revolution.[512]

At the very least, ILSA discourages the United States from successfully exercising future influence in Iran. Current U.S. policy towards Iran and in the Middle East in general has limited the U.S. role in future political dialogue in the region.[513] Several other countries, some of which are not welcome by the United States, are anxious to fill the vacuum created by the absence of American influence in Iran. The U.S. diplomatic quarantine of Iran runs the risk forging closer ties between Tehran and Moscow and increasing Russian influence in the region.[514] Such a result is clearly contrary to American objectives of denying Russian access to the Persian Gulf and fostering separation between Russia and its former satellite states in central Asia.[515] This vacuum could also be filled by the Peoples' Republic of China. Although Chinese influence in Iran may present a less likely scenario than that of Russia due to geographic, cultural and political distance, Chinese efforts to advance its objectives in central Asia through ambitious investments in Iran's oil and gas industries should not be discounted.[516]

The European Union also stands willing to fill the void created by the absence of American influence in Iran. Despite increased tensions regarding Iranian complicity in terrorist attacks occurring in Europe, the European Union recognized Iran's geopolitical importance and thus refused to sever diplomatic relations.[517] As a result, the European Union has maintained its influence in Iran. Hoping to expand this influence in the coming year, the European Union declared a "new begin-

510. *See* Rodman, *supra* note 182, at A13.

511. *See* Bolster, *supra* note 406, at A20. *See also* Haass, *supra* note 262, at C9; Atkinson, *supra* note 484, at A21; Lippman, *U.S. Aides Still Divided Over Sanctions on Foreign Investors in Iran*, *supra* note 258, at A33.

512. *See* Losman, *supra* note 413, at C3.

513. *See* Josef Federman, *Momentum Gathering for Changes in U.S. Policy Toward Iran*, ASSOC. PRESS, Jan. 24, 1997, *available in* 1997 WL 4853210.

514. *See* Drozdiak, *supra* note 203, at A15. *See also EU Returns Envoys to Iran--with Conditions*, *supra* note 460.

515. *See supra* notes 475 and 476 and accompanying text. Tsalik Nayberg, the chief representative of the U.S. oil company Unocal in Turkmenistan, has aptly noted in this regard that "Russia's desire to control central Asia can be seen by a blind man." Myre, *supra* note 189.

516. *See supra* note 448 and accompanying text.

517. *See* Afshin Valinejad, *Iran Says German, Danish Ambassadors Not Welcome to Return*, ASSOC. PRESS, Apr. 30, 1997, *available in* 1997 WL 4864238. *See also EU Returns Envoys to Iran--with Conditions*, *supra* note 460.

ning" in its relations with Iran in 1998 consisting of "substantial dialogue" concerning "critical topics."[518] Although the ultimate success of such efforts remain to be seen, the absence of American voices in this dialogue can only serve to further isolate U.S. policy on Iran and erode American influence in the region.

Additionally, ILSA could weaken the United States in the eyes of the Iranian government if the Clinton Administration fails to follow through on its threats to impose sanctions. As previously noted, the Clinton Administration has failed to impose sanctions on a single person since the enactment of ILSA two years ago.[519] However, the threat of sanctions never to be imposed loses credence and constitutes no penalty or restraint upon future conduct at all.[520] The repeated failure of the United States to enforce ILSA may result in the loss of its restraining effect upon foreign investment in Iran's oil and gas industries and Iranian behavior and diminution of American willpower in the eyes of the regime in Tehran.[521] The non-implementation of the severe penalties contained within Section 6 by a reluctant administration does little more than make the United States appear indecisive and conflicted. Such an appearance can hardly be expected to dissuade foreign businesses seeking to invest in Iran's oil and gas industries especially given the enormous potential revenues at stake.

Finally, ILSA is an overreaction to the Islamic regime in Tehran. This overreaction is most apparent in comparing the sanctions imposed upon Iran with those imposed upon the Soviet Union during the Cold War. For example, during the 1970s, American-Soviet relations were under considerable strain as a result of the provision of Soviet weaponry to the Egyptian army during the 1973 Middle East War, the Soviet intervention in the Angolan civil war, rising Soviet military expenditures and human rights concerns. As a result, in 1975, the Soviet Union was prohibited from receiving more than three hundred million dollars in new credits from the Export-Import Bank without presidential and congressional determinations that such new credits were in the national interest of the United States.[522] On August 1, 1978, President Jimmy Carter placed all exports of oil and gas exploration and production equipment to the Soviet Union on the Commodity Control List, thereby requiring that all such exports receive a validated license from the U.S.

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518. *See Germany Wants "New Beginning" in Ties with Iran*, ASSOC. PRESS, Jan. 9, 1998, *available in* 1998 WL 6636994. *See also Seeing More "Constructive" Leadership, EU Upgrades Iran Relations*, ASSOC. PRESS, Feb. 23, 1998, *available in* 1998 WL 7389330.

519. *See* notes 243-55 and accompanying text.

520. *See* notes 436-44 and accompanying text.

521. *See* notes 436-44 and 456-58 and accompanying text.

522. *See* Stanley J. Marcuss, *New Light on the Export-Import Bank, in* UNITED STATES FINANCING OF EAST-WEST TRADE 266 (Paul Marer ed., 1975). The restriction also included a total prohibition upon financing for fossil fuel production and a forty million dollar limit upon credits for fossil fuel research and exploration while the three hundred million dollar ceiling remained in force and effect. *See id.*

Department of Commerce.[523] The Soviet invasion of Afghanistan on December 27, 1979 resulted in the imposition of further restrictions upon trade with the Soviet Union. President Carter suspended all shipments of grain to the Soviet Union beyond the eight million tons provided for in the 1975 U.S.-Soviet Union grain trade agreement, thereby blocking the sale of seventeen million tons of corn and wheat.[524] President Carter also suspended the issuance of validated licenses for export of high-technology products pending the drafting of new guidelines and invalidated all outstanding licenses.[525] Additionally, President Carter imposed a quota upon American imports of Soviet ammonia and banned the export of phosphates and related fertilizer products to the Soviet Union.[526] Finally, Aeroflot flights to the United States were severely limited, and the Soviet fishing quota in American waters was reduced by 350,000 tons.[527] As a result, American-Soviet trade declined from 3.2 billion dollars in January through November 1979 to 1.2 billion dollars during the same period in 1980.[528]

However, those sanctions pale when compared to the sanctions currently in place against Iran. As previously noted, these sanctions include complete prohibitions upon the import of Iranian-origin goods and services into the United States as well the export of U.S.-origin goods and services to Iran.[529] U.S. persons are prohibited from making new investments in Iran.[530] The involvement of a U.S. person in any transaction to develop Iran's petroleum resources is prohibited regardless of its date of origin.[531] U.S. financial institutions are prohibited from engaging in any transaction related to goods or services of Iranian origin[532] and servicing accounts controlled by the Iranian Government.[533] These penalties are in addition to those imposed upon third persons pursuant to ILSA.

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523. *See* ERIK P. LINDELL, UNITED STATES REGULATION OF AMERICAN MULTINATIONAL INVOLVEMENT WITH THE SOVIET UNION DURING DÉTENTE 95-6 (1982). Despite these restrictions, U.S. exports to the Soviet Union reached record levels in 1979 totaling in excess of three and one half billion dollars. Additionally, in October 1975, the United States and the Soviet Union signed a grain trade agreement whereby the Soviet Union agreed to purchase a minimum of six million tons of corn and wheat from the United States annually and an additional two million tons without prior consultation with the U.S. Government. In September 1979, the Department of Agriculture approved the sale of up to twenty-five million metric tons of corn and wheat to the Soviet Union, the largest single grain purchase in American history. *See id.* at 98.

524. *See* SHAHEEN AYUBI ET AL., ECONOMIC SANCTIONS IN UNITED STATES FOREIGN POLICY 21 (1982).

525. *See id.* at 22.

526. *See id.*

527. *See id.*

528. *See* LINDELL, *supra* note 523, at 99.

529. *See supra* notes 158-61 and 167-68 and accompanying text.

530. *See supra* note 170 and accompanying text.

531. *See supra* note 164 and accompanying text.

532. *See supra* notes 160 and 169 and accompanying text.

533. *See supra* note 171 and accompanying text.

The charges against the government in Tehran are serious. Iran's sponsorship of terrorist groups,[534] efforts to acquire weapons of mass destruction[535] and hostility to the Arab-Israeli peace process[536] are major impediments to achieving peace and security in the Middle East and fostering cordial relations amongst all peoples. As the sole remaining superpower, the United States must accept the challenge to firmly address and overcome these obstacles. However, a "head-in-the-sand" policy which fails to engage the cause of these impediments and alienates U.S. allies is unrealistic and arrogant. For example, despite fighting an eight year war which cost the lives of more than 58,000 Americans, the United States recently began the process of normalization of diplomatic and economic relations with Vietnam.[537] Furthermore, the United States maintained diplomatic and economic dialogue with the former Soviet Union even while relations were contentious, nuclear weapons remained pointed at one another and each country pursued policies designed to thwart the other in the international arena.[538] Despite the serious nature of Iran's aberrant behavior, it cannot be convincingly argued that the threat to world peace and global security posed by it exceeds the one posed by the Soviet Union during the Cold War.

V. CONCLUSION

The Islamic regime in Iran has been the bane of every U.S. president for the last nineteen years. With the blessing of the Iranian Government, Islamic militants seized the American Embassy in Tehran and held fifty-two Americans, as well as the Carter Administration, hostage for 444 days. The hostage crisis humiliated the United States on an international scale at a time when Cold War hostilities with the Soviet Union were reaching new and dangerous levels. The hostage crisis also polarized American opinions of Iran, and perhaps Islam in general, as Americans were confronted with the nightly specter of burning flags and chants of "Death to America." More than any other event, the hostage crisis epitomized the alleged impotence of the United States during the Carter years and succeeded in returning a Republican to the White House.

However, the Reagan and Bush Administrations found themselves equally incapable of quelling abhorrent Iranian behavior. Iranian sponsorship of acts of international terrorism continued unabated and included alleged complicity in the bombings of the Marine barracks in

534. *See supra* notes 135-42 and accompanying text.

535. *See supra* notes 143-47 and accompanying text.

536. *See supra* notes 148-51 and accompanying text.

537. *See Clinton to Open Full Economic Relations with Vietnam*, AGENCE FRANCE-PRESSE, Dec. 18, 1997, *available in* 1997 WL 13456917. *See also Clinton Waives Major Curb on Trade with Vietnam*, WALL ST. J., Mar. 11, 1998, at A6, *available in* 1998 WL-WSJ 3485800.

538. *See* Rodman, *supra* note 182, at A13. *See also* Rodman, *supra* note 261, at A25.

Beirut in October 1983 and Pan Am Flight 103 in December 1988 as well as the seizure and protracted holding of Americans as hostages in Lebanon. The Iranian military continued to grow in strength and posed a threat to its weaker neighbors and shipping in the Persian Gulf.[539] The Iranian Government expressed no reservations about flexing its military might as evidenced by its cataclsymic eight year war with Iraq. The Iranian Government also continued its efforts to export its revolutionary blend of Islam and politics throughout the Middle East as evidenced by its sponsorship of a failed coup d'état in Bahrain in 1981 and its efforts to topple the ruling monarchy in Saudi Arabia. American humiliation at the hands of the Iranians also continued as attempts to circumvent prohibitions upon armament shipments to Central America through Iran by the Reagan Administration erupted into the Iran-Contra affair. The scandal occupied much of President Reagan's time and effort during his second term and left a permanent blemish upon his record of achievement. Furthermore, the scandal badly damaged the reputation of then-Vice President George Bush who incredulously insisted he was "out of the loop" with regard to the American initiative to Iran.

Although he has been able to avoid humiliation at the hands of the Iranian Government, President Clinton has had little success in modifying Iranian behavior. Iranian sponsorship of groups deemed to be terrorist in nature by the United States is believed to be ongoing. Such groups have been implicated in suicide bombings in Israel, assassinations throughout Europe and the attack upon the U.S. military complex in Dhahran, Saudi Arabia. Iranian efforts to develop chemical, nuclear and biological weapons are ongoing, and the country is on the verge of operating its first nuclear power plant. Iranian opposition to the Arab-Israeli peace process has encouraged resistance to the process by extremist groups as well as many Palestinians. The Clinton Administration has managed to avoid the pitfalls which ensnared its predecessors largely by eliminating dialogue, isolating the United States from contact with Iran and adopting policies which operate as if the two countries exist in a vacuum.

Despite the best efforts of four U.S. administrations to bring about the collapse of the Iranian Government through threats, sanctions and economic isolation, the Islamic regime remains firmly in control in Tehran. The regime has outlasted three presidents and is well on its way to outlasting a fourth president. The world has changed dramatically during this period of time. The Soviet colossus to Iran's north has collapsed into a rabble of fledging states vying for foreign aid on their uneven courses to free market economies and democratic capitalism. Ira-

539. Iran's military consists of the Army (345,000 personnel), the Revolutionary Guard (120,000 personnel), the Navy (18,000 personnel), the Air Force (30,000 personnel) and the army reserves (350,000 personnel). Iranian defense spending totaled $4.7 billion in fiscal year 1997. *See* IRAN: EIA REPORT, *supra* note 181, at 3.

nian influence in the region in the absence of the deterrence of Soviet military might will undoubtedly grow even as Russia scrambles to reassert its regional dominance. The stakes mount when the region's fabulous wealth of natural resources is added to the equation. In the nineteen years since the Islamic revolution, wars in Lebanon and Iraq have been fought, previously unheard of alliances (such as Syrian participation in the Gulf War coalition) have been formed, Jordan, Israel and the Palestinians have agreed to make peace (although implementation remains problematic) and American influence and popularity have fluctuated wildly. Yet, despite these occurrences, current U.S. policies toward Iran remain rooted in the denial, exclusion and isolation of previous administrations.[540]

The time has come for the United States to reevaluate its policies toward Iran - including its use of economic sanctions - in light of current political and economic realities in the Middle East.[541] It is time for the United States to consign the anger and frustration arising from the hostage crisis and the Iran-Contra affair to the scrap heap of history. After all, as noted by Richard Haass, "[f]oreign policy is not about poses nor is it a form of therapy . . . [but rather it] is about promoting this nation's interests."[542] How best to reorient U.S. policy remains problematic and beyond the scope of this article. However, at the very least, this reorientation should consist of three specific initiatives by the United States.

Initially, the United States should actively pursue dialogue with the Khatami Administration.[543] This dialogue should be initiated at the lower echelon of the diplomatic corps such as at the deputy or undersecretary of state levels.[544] This dialogue should address all Iranian concerns including past U.S. involvement in Iranian affairs, Iranian security concerns and the U.S. sanctions regime. This dialogue should also address American concerns regarding Iranian sponsorship of acts of international terrorism, efforts to acquire weapons of mass destruction, opposition to the Arab-Israeli peace process and regional security con-

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540. *See* Wright, *supra* note 264, at A1.

541. *See* Murphy, *supra* note 1, at C1. In this regard, Bruce Laingen, the senior U.S. diplomat held during the hostage crisis, recently stated that "[I]f I had been told that [Iranian-American relations] would be the same sixteen years later, I would have said, 'Don't be ridiculous.'" Federman, *supra* note 513. *See also* Laura Myers, *Former Hostages Say it is Past Time to Patch Up Relations with Iran,* ASSOC. PRESS, Feb. 9, 1998, *available in* 1998 WL 6641040.

542. Haass, *supra* note 262, at C9.

543. *See* Robert S. Greenberger, *Iran and the U.S. Could be Engaged in Early Stage of a Change in Relations,* WALL ST. J., Dec. 16, 1997, at A4, *available in* 1997 WL-WSJ 14177598. *See also A Moderate Cleric's Stunning Victory in Iran,* S.F. CHRON., May 28, 1997, at A18, *available in* 1997 WL 6698299. In this regard, U.S. Representative Lee H. Hamilton stated that "the United States and Iran need to cool the rhetoric, end mutual demonization, explore better ties and gradually establish a reliable and authoritative dialogue." Lippman, *supra* note 452, at A33.

544. *See* Murphy, *supra* note 1, at C1.

cerns.[545]

Secondly, the United States should reorient its policy toward Iran from one of unilateral action to one of multilateral cooperation by commencing efforts to forge a consensus on policy toward Iran with its allies, especially the European Union.[546] This consensus should "relate diplomacy to reasonable pressures against Iran"[547] by "setting concrete standards for judging the actual efficacy of . . . dialogue [with Iran] and . . . adopting a common policy based upon results."[548] If Iranian policies change during the course of this dialogue, the United States and its allies should respond in accordance with the dictates of their common policy.[549] In the case of the United States, these steps could include "reducing sanctions, permitting nonmilitary trade and allowing U.S. firms into Iran."[550] The United States could offer assurances that it would not enforce ILSA as an incentive to the European Union to enter into discussions to forge a common policy on Iran.[551] The United States should make it clear to its allies that it reserves the right to enforce ILSA in the event that the parties fail to reach agreement on common principles governing their relations with Iran.

Finally, there must be strict adherence to the principles contained in any common policy. This policy must not reward Iran in the absence of substantive behavioral alterations nor be subject to manipulation by Iranian intransigence.[552] This is not to advocate the adoption of an inflexible common policy. The diplomatic realities of negotiation and compromise make the likelihood of achieving absolute agreement on all aspects of a common policy toward Iran most unlikely. Furthermore, an inflexible policy toward Iran serves only to repeat the mistakes of recent

545. *See A 'Moderate' in Tehran*, *supra* note 503, at A18.

546. *See* Federman, *supra* note 513.

547. Henry A. Kissinger, *No Deals with Iran*, HOUS. CHRON., Oct. 26, 1997, *available in* 1997 WL 13067455.

548. Stephen S. Rosenfeld, *What 'Dialogue' With Iran?*, WASH. POST, Mar. 28, 1997, at A29.

549. *See* Federman, *supra* note 513.

550. Lippman, *supra* note 452, at A33.

551. Such an assurance has been criticized as an abandonment of the U.S. policy of isolation of Iran and a tacit admission of its failure. Such an admission would have the effect of opening the floodgates as firms which may have been deterred by ILSA would proceed with investments in the absence of penalties. *See* Rodman, *supra* note 182, at A13. *See also New Day Coming?*, TIME, Jan. 19, 1998, at 35, *available in* 1998 WL 7694174; Lippman, *U.S. Aides Still Divided Over Sanctions Against Foreign Investors in Iran*, *supra* note 258, at A33. However, such a result could be avoided by requiring U.S. allies to temporarily suspend investments by their nationals in Iran during negotiations to develop a common policy. Additionally, any U.S. assurance that ILSA would not be enforced during negotiations is different from a legislative repeal as it would allow subsequent prosecution against persons violating the Act during negotiations in the event of their failure to generate a common policy. In any event, the floodgates are already open as evidenced by the multibillion dollar investments which have flowed into Iran's oil and gas industries due, in part, to the Clinton Administration's failure to enforce ILSA.

552. *See* Rodman, *supra* note 182, at A13.

U.S. policies. However, once agreed upon, the parties to the common policy must implement its dictates without question in order to avoid the mistakes of the European Union's flabby policy of "constructive dialogue."[553]

Nineteen years of hostility cannot be undone or healed overnight, but efforts to reconcile the United States and Iran should commence immediately. The results of these efforts cannot be predicted with any degree of certainty. Dialogue may resolve U.S. differences with its allies and restore opportunities for U.S. companies to participate in the Iranian economy including the oil and gas industries.[554] The initiation of dialogue may also serve to legitimize the moderate tone of the Khatami administration and undercut the influence of Iranian hard-liners.[555] On the other hand, full diplomatic relations may not be restored for years. Economic relations may never be fully restored nor reach current levels existing between Iran and the rest of the world. Iranian behavior may never fully conform to international models of acceptable behavior let alone U.S. models of such behavior. What is certain is that eventually, either by design or as a result of an international crisis, the United States and Iran will have to engage in direct dialogue.[556] Obviously, it would be in the best interests of the United States to commence this dialogue by design rather than in exigent circumstances thrust upon it by the calamity of an international emergency. Until the United States demonstrates the courage and fortitude to initiate such dialogue, it cannot accurately determine the meaning of Khatami's election, evaluate the discordant voices emanating from his government, gauge the mood of the Iranian people or seek normalized relations.[557] Efforts to commence this dialogue at the present time may fail, but it bears to note that "even a hugely ambitious mission must begin with a first step."[558]

553. *See EU To Press For Less Rigid Stance On Iran*, *supra* note 130.
554. *See* Rodman, *supra* note 182, at A13.
555. *See id.*
556. *See* Bakhash, *supra* note 263, at A27.
557. *See* Murphy, *supra* note 1, at C1.
558. Bakhash, *supra* note 263, at A27.

GAME THEORY, INTERNATIONAL LAW, AND FUTURE ENVIRONMENTAL COOPERATION IN THE MIDDLE EAST

MOSHE HIRSCH*

I. INTRODUCTION

Interdependence is an underlying factor within numerous transnational environmental systems. This interdependence generates an interactive decision-making setting in which a state's choice of action is contingent upon the expected behavior of other actors in the international arena. National decision-makers are aware that the quality and quantity of essential environmental resources available in their territo-

ries is determined not only by natural factors and their own behavior, but by the actions of other states.

Attaining optimal results in an interactive situation frequently requires "collective action." Collective action occurs when the efforts of two or more individuals are needed to achieve a certain outcome, one which will typically further the interests or well-being of the group.[1] In terms of *Pareto Optimality*,[2] the course of action which leads to the best outcome for the group is cooperative behavior. The main problem with collective action occurs when a rational individual's behavior leads to *Pareto inferior* outcomes. This phenomenon often happens in large groups and in situations in which all individuals agree about the common good and the desirable means of achieving it.[3]

In his seminal book, "*The Logic of Collective Action*", Mancur Olson rigorously presents the basic proposition that rational self-interested individuals frequently will not act in concert to achieve common interests.[4] The negative repercussions of Olson's proposition for international environmental cooperation increases together with the ratio of inter-state environmental independence. While environmental interdependence has long been apparent in the international arena, it has become increasingly prevalent in recent decades. In light of this rapidly growing trend, as well as the deterioration of essential environmental resources in most parts of the world, Olson's theory is particularly relevant to the international community today.

The Middle East environmental system exemplifies both the need for and the impediments to successful regional collective action. Several diverse parties share the Middle East's primary environmental resources. Thus, when a party takes action in one jurisdiction it fre-

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1. TODD SANDLER, COLLECTIVE ACTION: THEORY AND APPLICATIONS 1 (1992). *See also* Jon Elster, *Rationality, Morality and Collective Action*, 96 ETHICS 136, 139 (1985).

2. "An allocation . . . of resources is *Pareto optimal* when it is not possible to improve the well-being of one individual without harming at least one other." SANDLER, *supra* note 1, at 13-14.

3. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965);MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 19 (1987).

4. OLSON, *supra* note 3, at 2.

quently affects environmental resources in neighboring areas.[5] Such interactive features characterize the Middle East's crucial water resources, marine environment and air basin. Some of the region's environmental resources are at significant risk and future developments may further imperil their sustainable utilization. The peace process, if successful, is expected to generate accelerated economic development and industrialization in the region, particularly in the West Bank and Gaza Strip. Increased economic development will place more pressure on the region's fragile resources.

Efficient utilization of the Middle East's environmental resources requires the parties to establish and implement cooperative arrangements. In the past, armed conflicts in the Middle East precluded almost any environmental cooperation among the parties. Indeed, the first elaborated cooperative arrangements only emerged in 1994. The environmental provisions in the recently concluded agreements between Israel and its neighbors[6] have a clear bilateral character. However, optimal protection and utilization of the region's environmental resources frequently necessitates the establishment of cooperative arrangements on a regional level. Furthermore, the termination of hostilities does not ensure that an optimal framework for cooperation will emerge in the future. Recall Olson's proposition regarding collective action failure: rational self-interested actors frequently will not act to achieve their common interests, even when optimal results and the appropriate means of attaining them are agreed upon.

Avoiding collective action failure in the Middle Eastern environmental system requires an examination of the factors motivating or hindering international cooperation.[7] Identification of these critical factors helps predict which environmental domains are more susceptible to collective action failure. Armed with an understanding of the impact of these factors, the challenge facing scholars of international law is to devise appropriate legal mechanisms to modify the structure of problem-

5. This article focuses on environmental resources available to Egypt, Israel, Jordan, and the Palestinians in the West Bank and Gaza Strip. The inputs of other states, like Syria and Lebanon, are also taken into account.

6. *See* Articles 12, 25, 27, and 40 of the Protocol Concerning Civil Affairs to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip 36 I.L.M. 551 (1997). See Moshe Hirsch, *Environmental Aspects of the Cairo Agreement on the Gaza Strip and the Jericho Area*, 28 ISR. L. REV. 374 (1994), for a discussion on the environmental provisions of the 1994 Cairo Agreement. *See also* Articles 6, 18, Annex II, and Annex V of the 1994 Treaty of Peace between The State of Israel and the Hashemite Kingdom of Jordan, 34 I.L.M. 46 (1995).

7. On the significance of this question, Elster states: "I believe there is no more important problem in the social sciences, and none that is more difficult. Understanding why people cooperate and trust one another may be the first step toward bringing about more cooperation and trust." Elster, *supra* note 1, at 141.

atic settings to improve the prospects of cooperation.[8]

Through the use of game theory, this article explores some of the principal factors influencing the emergence and maintenance of international cooperation in order to develop legal guidelines for establishing an effective environmental mechanism in the Middle East. As this article will show, game theory concepts and models provide a valuable tool for analyzing the phenomenon of cooperation, enabling international lawyers to shape legal norms which will enhance the prospects for environmental cooperation in the Middle East. Part II of this article sets forth the basic concepts and models of game theory and its relationship to modern international relations theory. Part III presents a game theoretical analysis of two major environmental settings in the Middle East: marine pollution in the Gulf of Aqaba and water contamination of the Mountain Aquifer. It then suggests some legal mechanisms to enhance the likelihood of cooperation in these settings. Part IV concludes the article by exploring the options and limits of combining game theory and international law as an instrument to improve the prospects of cooperation. The article ultimately states that this combination offers scholars and policy-makers important insights into better legal mechanisms for long-term international cooperation.

II. GAME THEORY AND COOPERATION

A. *Basic Elements of Game Theory*[9]

Mathematicians were the first to develop game theory, primarily for use in economics. Later, other disciplines, such as political science, international relations, law, sociology and biology also employed game theory concepts. Game theory is a strand of rational choice theory,[10] "designed to treat rigorously the question of [the] optimal behavior"[11] of

8. Legal rules do not always aim to support cooperation. In some cases, the major aim of a legal mechanism is to avoid cooperation. For example, anti-trust laws or legal rules prohibiting criminal collaboration exist for this purpose.

9. For a general introduction to game theory, see DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991); ROBERT GIBBONS, GAME THEORY FOR APPLIED ECONOMISTS (1992); SHAUN P. HARGREAVES HEAP & YANIS VAROUFAKIS, GAME THEORY: A CRITICAL INTRODUCTION (1995); R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY (1957); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1994); ERIC RASMUSEN, GAMES AND INFORMATION (2d ed. 1994); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953).

10. See SHAUN HARGREAVES HEAP ET AL., THE THEORY OF CHOICE: A CRITICAL GUIDE at vii-x, 3-25 (1992); MORROW, *supra* note 9, at 7-8, for a discussion on rational choice theory and its basic assumptions,.

11. Oskar Morgenstern, *Game Theory: Theoretical Aspects*, *in* 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 62 (David L. Sills ed., 1968).

decision-makers in "strategic" situations. The term "strategic" refers to situations in which the outcome does not depend solely on the decision-maker's behavior or nature, but also on the behavior of other participants. An important factor shaping an individual's choice is the social setting or "structure" of a particular situation. Game theory enables social scientists to formalize social structures and then examine the implications of the structure on individual decisions.[12]

A *"game"* is any interaction between players governed by a set of rules specifying the possible moves for each participant and a set of outcomes for each possible combination of moves. The decision-makers are assumed to be *rational* in the sense that they have certain goals, which they strive to attain through their actions. They have a consistent preference ordering of goals, know the rules of the game, and know that the other players are also rational.[13]

Game theory represents interactions between participants in two principal forms: the normal (or strategic) form game and the extensive (or tree) form game. A matrix showing each player's payoff for each combination of strategies often represents a normal game. The normal representation is more appropriate for simultaneous decision-making while the extensive form is more suitable to sequential-move games. The latter form also displays the information each player knows when making his decisions.[14] The basic elements of the normal form game include: (1) *the players* - the actors who make the decisions (either individuals or collective decision-making units like firms or states); (2) *the strategy* space - the range of moves available to a player in a given situation (i.e., to cooperate or to defect); and (3) *the payoffs* ('utilities') - the outcome generated for the players from a chosen move or strategy.[15]

A game theoretical analysis of social phenomena often does not allow for the allocation of accurate payoffs to expected outcomes. In some cases, it is possible to assign *ordinal payoffs* to expected outcomes (i.e., to organize the various outcomes in accordance with the order of priorities for the relevant player) and then to allocate a respective ordinal number to each outcome. This method leads to interesting inferences in numerous situations.[16] However, without knowing the "distance" be-

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12. *Id. See also* Robert. J. Aumann, *Game Theory, in* THE NEW PALGRAVE: GAME THEORY 1, 2 (John Eatwell et al. eds., 1987); MORROW, *supra* note 9, at 1.

13. FUDENBERG & TIROLE, *supra* note 9, at 4; HEAP & VAROUFAKIS, *supra* note 9, at 1, 4-31; MORROW, *supra* note 9, at 7-8, 16-20.

14. D.G. BAIRD ET AL., GAME THEORY AND THE LAW 50 (1994); FUDENBERG & TIROLE, *supra* note 9, at 67; GIBBONS, *supra* note 9, at 4, 115-16; HEAP & VAROUFAKIS, *supra* note 9, at 42-43 MORROW, *supra* note 9, at 58-69.

15. BAIRD ET AL., *supra* note 14, at 7-9; FUDENBERG & TIROLE, *supra* note 9, at 4-5; GIBBONS, *supra* note 9, at 2-4.

16. For a discussion of this method of assigning payoffs, see HEAP & VAROUFAKIS, *supra* note 9, at 5-12; Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25, 46-48 (1985); *see also* STEVEN J. BRAMS, GAME THEORY AND POLITICS 13-

tween the payoffs on an interval scale, one cannot accurately calculate the probabilities with which each party would choose each outcome.[17]

After reducing sets of interactions to a normal or extensive game, the next step is to determine the game's solution. Finding the "solution" of a game serves a normative goal, as it may reveal the best strategy for a rational player. It also serves a predictive aim, as it may indicate how rational players are likely to behave in such situations. A simple example is the notion of *dominant strategy*. A strategy is strictly dominant if it is a best strategy (i.e., it maximizes a player's payoff), regardless of the other player's actions. When it is possible to identify a single dominant strategy, one can safely assume that a rational player will adopt the dominant strategy. Conversely, by identifying dominated strategies, one can assume that rational players will not adopt them.[18]

While a strict dominant strategy will not solve many games, the Nash-equilibrium solution applies to a much broader spectrum of cases. A *Nash-equilibrium* is the combination of strategies, representing the best response of each player to the predicted strategies of the other players. Such a prediction may be called "strategically stable" or "self-enforcing" because no single player is interested in deviating from the predicted strategy.[19]

Game theory is divided into cooperative and non-cooperative game theory, based on the enforceability of agreements and communication. *Cooperative game theory* assumes the existence of an institution capable of enforcing the agreements concluded between the players; whereas *non-cooperative game theory* assumes no such institution exists. In cooperative games, communication between the players is allowed while in non-cooperative games, communication may or may not be allowed.[20] Due to the lack of a central enforcement mechanism within the current international system, this study is concerned with non-cooperative games.

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16 (1975) (using the ordinal method to analyze a specific case).

17. BRAMS, *supra* note 16, at 20.

18. GIBBONS, *supra* note 9, at 5; BAIRD ET AL., *supra* note 14, at 11-14; HEAP & VAROUFAKIS, *supra* note 9, at 44-45; FUDENBERG & TIROLE, *supra* note 9, at 6-8. A dominated strategy can sometimes be found by a process of iterated elimination of strictly dominated strategies. *See* GIBBONS, *supra* note 9, at 4-8.

19. BAIRD ET AL., *supra* note 14, at 11-22; FUDENBERG & TIROLE, *supra* note 9, at 11-12; GIBBONS, *supra* note 9, at 8-9; HEAP & VAROUFAKIS, *supra* note 9, at 52-53.

20. Joseph E. Harrington, Jr., *Noncooperative Games*, *in* THE NEW PALGRAVE, *supra* note 12, at 178; MORROW, *supra* note 9, at 75-76; HEAP & VAROUFAKIS, *supra* note 9, at 38.

B. Game Theory and Modern International Relations Theory

The basic assumptions of game theory are compatible with the basic assumptions of modern international relations theory. Prevailing international relations theory assumes that: (1) States are the central actors in the international system; (2) States are not subordinated to a central international authority to enforce cooperation; (3) States are egoists - they constantly try to maximize their interests; and (4) States are rational - they have consistent, ordered preferences, which derive from calculating the costs and benefits of alternative courses of action.[21] Clearly, assumptions (2), (3) and (4) are consistent with those of non-cooperative game theory. Meanwhile, assumption (1) in no way contradicts any of the underlying premises of game theory.[22]

The concepts fundamental to international regimes, game theory and cooperation, are interrelated.[23] Game theory explains the conditions under which international regimes arise as an instance of cooperation, suggesting conditions conducive to stable compliance with them. Generally, international cooperation is a prerequisite to the establishment of international regimes.[24] However, cooperation, particularly short-term cooperation, can take place without the existence of international regimes.[25] Nonetheless in most cases, the creation of international regimes facilitates the establishment of long-term cooperative patterns between States.

While game theory provides a valuable tool for analysis of international cooperation, game theoretical models do not take into account various factors which frequently affect international cooperation. Such missing factors include the personal characteristics of decision-makers, as well as the social and moral values prevailing in their respective environments. On the other hand, game theoretical models do not at-

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21. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 18, 27 (1984); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 346-50 (1989).

22. While the above assumptions largely reflect the neo-realist school in international relations (the prevailing school today), both realists and liberals presume self-interested, purposive and calculated behavior by states. *See* ARTHUR A. STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 10 (1990).

23. The prevailing definition of international regimes is "implicit or explicit principles, norms, rules and decision-making procedures around which the actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasver ed., 1983). *See also* KEOHANE, *supra* note 22, at 57. For other definitions, see Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 40 INT'L ORG. 491, 493-94 (1987).

24. *See* Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 WORLD POL. 1, 20-21 (1985).

25. Haggard & Simmons, *supra* note 23, at 504.

tempt to address all factors relevant to collective action. Rather, they aim to simplify and abstract reality by focusing on certain factors of collective action while exploring the interplay among them. Such an analysis seems simplistic, but the simplification proves useful in clarifying complex interactions.[26]

Despite the imperfections which come from focusing on one set of variables, and the difficulties associated with assigning numerical payoffs to expected outcomes, game theoretical analysis sets forth the expected trends of decision-makers as well as the decisions likely to be adopted in particular settings. Furthermore, game theoretical analysis frequently provides scholars and policy-makers with insights regarding mechanisms designed to elicit and support stable cooperation.

C. *Models of Collective Action*

Each of the many collective action models presents a different payoff structure. This section presents the widely discussed models in game theoretical and international relations literature. After clarifying the basic features of each model, this section focuses on the prospects for cooperation in each setting. It should be noted that the Middle Eastern environmental settings do not accurately reflect the game theoretical models presented here. Frequently, however, it is possible to identify a particular environmental setting which presents strong features of a certain game theoretical model. As such, the insights drawn from the models presented below provide important indications regarding the expected trends of the decision-makers in these environmental settings.

1. Zero-Sum Games

Zero-sum game is one of game theory's most famous models. Particularly during the early stages of the theory's development, zero-sum game served as a polar case and historical point of departure. The key feature of zero-sum game is that the sum generated for the players for each possible combination of moves is zero. A game in which the sum of the payoffs is always constant (not necessarily zero) is called "constant-sum game" and its strategic analysis is equivalent to zero-sum game. In zero-sum games, whatever one player wins the other loses.[27] Since the payoffs to Player 2 are equal to the negative payoffs to Player 1, it is possible to simplify the strategic form and only write the payoffs of

26. MORROW, *supra* note 9, at 8. For a discussion on the application of rational choice models to international relations, *see* KEOHANE, *supra* note 21, at 65-74; Robert Jervis, *Realism, Game Theory and Cooperation*, 40 WORLD POL. 317 (1988).

27. FUDENBERG & TIROLE, *supra* note 9, at 4; MORROW, *supra* note 9, at 74-75; VON NEUMANN & MORGENSTERN, *supra* note 9, at 46-47.

Player 1. Figure 1 illustrates the payoff matrix for a two-person zero-sum game:[28]

		Player 2	
		S1	S2
Player 1	S1	2	2
	S2	1	3

Figure 1: A Two-Player Zero-Sum Game

The solution to a zero-sum game, as suggested by Von Neumann and Morgenstern, involves the *Maximin Principle*, which directs players to maximize their security levels. The security level is the least amount that a player can receive from his move. The result of this game is an equilibrium pair in cell S1S1 generating 2 payoffs to Player 1, and -2 to Player 2.[29] This cell is called the "saddle-point." However, not all zero-sum games have a saddle-point.[30] The *Maximin Principle* is not only valid for a one-shot game, but applies to iterated games as well.[31]

Two-player zero-sum games represent strictly competitive situations. The players maintain opposing preferences and are considered rivals. As such, the players are in conflict and not inclined to cooperate.[32] Zero-sum games may have more than two players (*N-players games*) and some players may have an interest in cooperating against the rest of the players (i.e., in forming a *coalition*).[33] As one might imagine, a two player zero-sum game represents one of the worst models for international cooperation.

Similar levels of competitiveness also exist in non-zero-sum. These are games in which the players seek relative rather than absolute gains

28. This figure illustrates the famous Battle of Bismarck Sea in World War II; *see* LUCE & RAIFFA, *supra* note 9, at 64-65; BRAMS, *supra* note 16, at 3-4.

29. In the case represented in Figure 1, Player 1 (the maximizing player) should choose S1, the strategy that assures him/ her at least 2 payoffs. Player 2 (the minimizing player) should select S1, which would assure him no more than -2 (in comparison to -3 which may arise from S2). BRAMS, *supra* note 16, at 4; LUCE & RAIFFA, *supra* note 9, at 64-65; Michael Bacharach, *Zero-sum Games, in* THE NEW PALGRAVE, *supra* note 12, at 253. For some criticism of the Minimax principle, see Bacharach, *id.*, at 255-56.

30. Every zero-sum game with mixed strategies, however, has a saddle point; *see* Bacharach, *supra* note 29, at 255. In a *pure strategy*, a player adopts a particular strategy throughout the game. In a *mixed strategy*, a player adopts a strategy that distributes probability among several pure strategies; GIBBONS, *supra* note 9, at 30.

31. LUCE & RAIFFA, *supra* note 9, at 103. 'One shot games' and 'iterated games' will be explained in Part II.C(2).

32. LUCE & RAIFFA, *supra* note 9, at 59-61; Bacharach, *supra* note 29, at 253.

33. MORROW, *supra* note 9, at 75; VON NEUMANN & MORGENSTERN, *supra* note 9, at 220-22.

(i.e., in military contexts where the aim is to achieve superiority). When the game has only two players who are exclusively interested in relative gains, the situation can be modeled as a zero-sum game with no room for cooperation. The conflict diminishes significantly when there are more than two players, or if the concern for relative gains is less than total.[34]

Pure zero-sum situations rarely arise in the international arena, if at all. Strong features of zero-sum games are present in some international settings such as wars or sovereignty disputes over a particular territory.[35] Fortunately, the utilization of common environmental resources almost never represents a zero-sum game. Most international environmental resources are renewable. Thus, the sum of quantities available to the parties is not constant, rather it depends significantly upon the players' strategies. However, use of a shared, non-renewable environmental resource, like fossil water reservoirs,[36] may lead the parties to adopt strategies commonly employed in zero-sum games.

2. The Prisoner's Dilemma

The models discussed in the remainder of this section represent non-zero-sum games, the most famous of which is the Prisoner's Dilemma ("PD").[37] The PD model attracted considerable attention from both game theorists and scientists in various disciplines because the game's implications apply to a wide range of social phenomena. The normal form of PD is presented in Figure 2: let C (Cooperate) equal

34. Duncan Snidal, *Relative Gains and the Pattern of International Cooperation*, 85 AM. POL. SCI. REV. 703 (1991). See Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303 (1991), for a further discussion on relative gains.

35. *See, e.g.*, with respect to the dispute between Israel and the Palestinians over East Jerusalem, Moshe Hirsch, *The Future Negotiations Over Jerusalem, Strategical Factors and Game Theory*, 45 CATH. U. L. REV. 699, 711-12 (1996).

36. On nonrenewable groundwater in the Middle East, *see* MASAHIRO MURAKAMI, MANAGING WATER FOR PEACE IN THE MIDDLE EAST: ALTERNATIVE STRATEGIES 90-103, 182-83 (1995).

37. The game nicknamed Prisoner's Dilemma, attributed to A. W. Tucker, is typically presented with the following story. Two persons, apprehended by the police with stolen goods, are suspected of burglary and taken into custody and separated. The district attorney is certain that they are guilty of burglary, but he/she does not have adequate evidence to convict them at a trial. The district attorney explains to each prisoner (separately) that he/she has two alternatives: (1) to confess to the crime of burglary, or (2) not to confess. If both of them confess, both will be convicted of burglary and sentenced to two years in prison. If neither confesses, both will be convicted of possession of stolen goods and given a six-month prison sentence. If only one confesses, the confessor will go free, while the other will get the maximum sentence of five years. *See* ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION 24-25 (1965); LUCE & RAIFFA, *supra* note 9, at 94-95; Anatol Rapoport, *Prisoner's Dilemma*, *in* THE NEW PALGRAVE, *supra* note 12, at 198.

"not confess;" and D (Defect) equal "confess." By convention, the first payoff in each cell is to the row player, and the second payoff is to the column player.

		Player 2	
		C	D
Player 1	C	0.5, 0.5	5, 0
	D	0, 5	2, 2

Figure 2: Prisoner's Dilemma

From Player 1's perspective; if Player 2 chooses strategy C or D, then Player 1 prefers D to C. Thus, strategy D strictly dominates strategy C. The same analysis holds true for Player 2, as C is strictly dominated by D. The result is that D is the *dominant strategy* for both players and cell DD represents the only *Nash equilibrium* for PD. As explained above, in *Nash equilibrium*, no player is interested in deviating from his predicted strategy.[38] The result generated in DD (2,2) is sub-optimal for both players who strongly prefer the result of CC (0.5, 0.5). PD represents a collective action failure. Since each rational player is not expected to deviate from his strategy of confession, the outcome of the combined strategies (mutual confession) constitutes a *Pareto inferior* equilibrium.

A situation is defined as PD and generates the undesirable results noted above if the following inequalities among payoffs exist:

$DC > CC > DD > CD$

and $2CC > CD + DC$.[39]

PD is by definition a *non-cooperative game* and communication is not allowed between the players. Yet even allowing the players to communicate would not significantly change the expected outcomes of the game. If the players could communicate, they would be expected to agree to adopt strategy CC to generate better payoffs. Even after they agreed, the structure of the game would not change. Without an authority to enforce the agreement, each party would have a strong interest in breaching it because the payoff structure remains the same: $2CC > CD + DC$.[40]

Increasing the number of players (*N-players games*) does not alter the sub-optimal outcome of the game. In fact, the problem may even

38. *See also,* DAVID KREPS, GAME THEORY AND ECONOMIC MODELLING 28 (1990).

39. *See* RAPOPORT & CHAMMAH, *supra* note 37, at 34-35.

40. *See* RAPOPORT & CHAMMAH, *supra* note 37, at 25-26; LUCE & RAIFFA, *supra* note 9, at 96.

worsen because each additional player obtains a higher payoff if he or she adopts strategy D in comparison to strategy C, and D dominates C.[41]

The sub-optimal outcomes generated by *Nash equilibrium* in one-stage games ("one-shot games") do not necessarily occur in iterated games. The main point in iterated games is that credible threats or promises regarding future rounds can influence the players' behavior in the present round. *Finite iterated PD games* involve situations in which the players know when the game ends. Employing *backward induction* logic, one can anticipate that players in these games will adopt their dominant strategy of defection. When the game is iterated a finite number of times, the players in the last stage will not concern themselves with how their action will affect future payoffs. Thus, rational players will adopt their dominant strategy and "defect" in the last round (as they are expected to do in one-shot games). On the next-to-last move, given the solid expectation of defection in the last round, there is no incentive for players to deviate from the dominant strategy. The same pattern of behavior is expected until the players reach the first round.[42]

Mutual cooperative behavior is expected in infinite iterated games, or in finite games in which the players are not certain when the last play will occur. Without a specific date for the last stage, there is no starting point for backward induction logic, thus inducing cooperation in the next stages by current behavior remains a viable option. The key factor is that choices made in the present round not only determine the outcome of this stage, but can affect payoffs generated in future rounds. Future payoffs are, however, probably less important than present payoffs. This phenomenon is referred to as the *discount factor.* The *discount factor* represents the current value of a dollar to be generated at some later stage. The discount factor (usually written as 'δ') falls between 0 and 1, and its relation to the interest rate (r) is $\delta = 1/(1+r)$.[43]

There is more than one strategy that can elicit cooperation in infinite iterated PD. The most famous is *Tit-for-Tat,* which achieved the highest score in Axelrod's well-known experiments.[44] *Tit-for-Tat* is a

41. Rapoport, *in* THE NEW PALGRAVE, *supra* note 12, at 199-200; LUCE & RAIFFA, *supra* note 9, at 97; TAYLOR, *supra* note 3, at 15.

42. *Compare* HEAP & VAROUFAKIS, *supra* note 9, at 168-69, *and* FUDENBERG & TIROLE, *supra* note 9, at 111, *and* LUCE & RAIFFA, *supra* note 9, at 98-99, *with* RAPOPORT & CHAMMAH, *supra* note 37, at 28-29, *and* GIBBONS, *supra* note 9, at 224 (presenting experimental evidence).

43. *See* GIBBONS, *supra* note 9, at 68, 88; MORROW, *supra* note 9, at 38.

44. In Axelrod's experiments, professional game theorists were invited to send programs to a computer tournament playing iterated PD 200 times. Each participant wrote a program which included a rule for selecting the cooperative or non-cooperative choice on each move. The program had access to the history of the game and could use this history in making a choice. Each program was paired with another program, including its own

strategy of cooperating on the first move and then copying the other player's previous move. In order to motivate cooperation by *Tit-for-Tat* in infinite PD games, the players must not significantly underestimate future gains. In other words, the discount rate should be close to one. Generally, the likelihood of cooperation in such circumstances is increased together with the increase in three variables: (1) the discount rate; (2) the payoffs associated with cooperation; and (3) the reduction in the payoffs generated by defection. There is interplay between these variables. For instance, when the discount factor is not high enough to elicit cooperation through simple *Tit-for-Tat* strategy, using a more severe contingent strategy to decrease the payoffs for defection (like the *Grim Trigger*)[45] may remedy this shortage and increase the likelihood of cooperation.

When the discount factor or the number of payoffs generated by cooperation is decreased, cooperation can be attained by decreasing the payoffs associated with defection, particularly by harsher acts of retaliation. The possibilities of motivating cooperation by threats are, however, limited. A player is not expected to take into account a *non-credible threat*; that is, a threat that costs more to carry out than not to carry out.[46] A strategy involving threats is considered *credible* if it yields the threatening player, and other participants, the best outcomes in the remaining stages of the game (i.e., constitutes a subgame-perfect *Nash equilibrium*).[47]

These results regarding cooperation in two-player infinite PD games also apply to N-player games.[48] The difference is that in N-player infinite games, cooperation may emerge among some players

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program. The program with the largest cumulated payoff won the tournament. *Tit-for-Tat*, which was submitted by Rapoport, won the tournament over the other fourteen programs submitted. The results of the tournament were published and a second round was conducted. Out of the 63 programs submitted, *Tit-for-Tat*, which Rapoport resubmitted, achieved the best score. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27-54 (1984); Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306 (1981); Rapoport, *in* THE NEW PALGRAVE, *supra* note 12, at 200-202.

45. The *Grim Trigger* answers any move of defection with defection for all future rounds of the game; MORROW, *supra* note 9, at 266. *See also* GIBBONS, *supra* note 9, at 91-99. On other contingent strategies, see Martin Patchen, *Strategies for Eliciting Cooperation from an Adversary*, 31 J. CONFLICT RESOL. 164, 171-81 (1987).

46. HEAP & VAROUFAKIS, *supra* note 9, at 115-16; KREPS, *supra* note 38, at 49-53.

47. GIBBONS, *supra* note 9, at 57, 94-99. A subgame is a part of a game, or the part that remains to be played beginning at any point at which the complete history of the game is common knowledge among the players. For a precise definition of a subgame see GIBBONS, *supra* note 9, at 94, and HEAP & VAROUFAKIS, *supra* note 9, at 82. A Nash equilibrium is subgame-perfect if the players' strategies constitute a Nash equilibrium in every subgame. *See* GIBBONS, *supra* note 9, at 95; *see also* HEAP & VAROUFAKIS, *supra*, note 9, at 84.

48. HEAP & VAROUFAKIS, *supra* note 9, at 175-76.

even if the rest consistently adopt a non-cooperative strategy. Such partial cooperation is possible if the cooperative players cooperate on the condition that the other cooperative players cooperate, and if each of their discount rates is high enough.[49]

The Prisoner's Dilemma attracted enormous attention from game theorists and social scientists, especially after the publication of Axelrod's work. Many scholars believed that PD captured the problem of collective action. PD became the paradigmatic example, as stated by Rasmusen: "[w]henever you observe individuals in a conflict that hurts them all, your first thought should be of The Prisoner's Dilemma."[50]

Axelrod's optimistic message was that cooperation may emerge and be sustained even among egoists operating in a system without a central enforcement authority. As previously stated, PD has been applied to numerous disciplines, including biology,[51] economics,[52] international trade,[53] political science,[54] international relations[55] (especially arms control)[56] and law.[57] In addition, the model effectively represents the problem of externalities and thus has been applied to several environmental collective action problems.[58] Some scholars[59] even characterized the celebrated "Tragedy of the Commons"[60] as a PD. At some point, it seemed that the model represented all forms of collective action prob-

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49. TAYLOR, *supra* note 3, at 82-105. In some groups, there is an inherent tendency for exploitation of the great members (in terms of the size and extent of their interest in the product to be generated by cooperation) by the smaller ones. *See* OLSON, *supra* note 3, at 34-36; SANDLER, *supra* note 1, at 54-58.

50. RASMUSEN, *supra* note 9, at 18.

51. *See, e.g.*, Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390 (1981).

52. *See, e.g.*, KREPS, *supra* note 38, at 39.

53. *See* J. David Richardson, *The New Political Economy of Trade Policy, in* STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 267, 270-75 (1986).

54. TAYLOR, *supra* note 3, at 129; *see also* STEIN, *supra* note 22, and the references therein.

55. *See, e.g.*, Glenn H. Snyder, *Prisoner's Dilemma and Chicken Models in International Politics*, 15 INT'L STUD. Q. 66 (1971); BRAMS, *supra* note 16, at 26-38; STEIN, *supra* note 22, at 31-35. *See* Abbott, *supra* note 21, at 360-62 (for additional references on the subject).

56. *See, e.g.*, STEVE WEBER, COOPERATION AND DISCORD IN U.S.-SOVIET ARMS CONTROL 17 (1991).

57. *See* BAIRD ET AL., *supra* note 14, at 167, 201.

58. *See, e.g.*, Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law*, 90 AM. J. INT'L L. 384, 389 (1996); CRISTINA BICCHIERI, RATIONALITY AND COORDINATION 224 (1993); William H. Rodgers, Jr., *The Evolution of Cooperation in Natural Resources Law: The Drifter/Habitue Distinction*, 38 U. FLA. L. REV. 195, 199-200 (1986).

59. THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 110-15 (1978); Duncan Snidal, *Coordination versus Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 929 (1985) [hereinafter *Coordination*].

60. Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

lems, and several authors expressed the view that the logic underlying the problem of collective action is the logic of the PD.[61] This was a sweeping generalization. Today, it is clear that the structure of some collective action problems is different from the structure of the PD.

3. The Assurance Game

Scholars approaching collective action problems with the tools of game theory devoted disproportional attention to PD. Nevertheless, all that attention should not detract from the relevance of other game structures commonly applied in the international system. While the Assurance game[62] presents less conflict-driven features than PD, successful collective action remains uncertain. As shown in Figure 3, attaining the optimal outcome in the Assurance game requires cooperation by all players.

		Player 2	
		C	D
Player 1	C	4, 4	1, 3
	D	3, 1	2, 2

Figure 3: The Assurance Game

The preference ordering of the players in the Assurance game is: CC>DC>DD>CD.

Examination of the above matrix shows that the game has two *Nash equilibriums* (CC and DD) and neither dominates the other. While CC is *Pareto superior* to the other possibilities, rational players may reach the equilibrium of DD. A player may play D if he or she is not certain whether the other will play C or D, and if he or she is determined to avoid the worst outcomes of CD. In such cases, "all hare risk-dominates all stag."[63] Pre-play communication between the players may alleviate the problem in Assurance situations. A rational

61. *See, e.g.*, Russell Hardin, *Collective Action as an Agreeable N-Prisoners' Dilemma*, 16 BEHAV. SCI. 472 (1971).

62. Rousseau's story of the stag hunt commonly illustrates the Assurance game structure in which two hunters must cooperate in order to catch a stag. If they catch a stag, it will be shared between the hunters, thus generating the best outcome (CC). If both hunt for hare, each of them will catch one hare and attain inferior payoffs (DD). The worst result for a hunter arises if he/she attempts to catch the stag while the other hunts for hare (CD). Here, the second will catch a hare and the first will catch nothing. *See* FUDENBERG & TIROLE, *supra* note 9, at 3; RUSSELL HARDIN, COLLECTIVE ACTION 167-68 (1982).

63. FUDENBERG & TIROLE, *supra* note 9, at 20.

player is expected to pledge to play C, thus improving the chances that the other player also will adopt a cooperative strategy. Such communication does not, however, completely eliminate the likelihood of defection.[64]

In two-player sequential Assurance situations, a player may drive the other to cooperate in the next move by playing C in the first stage. A player may also accomplish this by committing to a cooperative strategy in an early stage. The same is true for N-player settings regarding all the players but the last one. If all players except the last one have already played C , or committed themselves to cooperate, a last rational player will cooperate to gain the optimal results of CC.

Attaining optimal results in N-player games is less likely than in two-player sequential situations. A rational player in N-player games is aware that the desirable result emerges only if all players cooperate. Increasing the number of players increases the likelihood that one player will defect. Subsequently, this decreases a rational player's incentive to cooperate and to take the risk of suffering the worst outcome.

In the iterated game scenario, the prospects for cooperation are fostered. In iterated Assurance games, the gap between the optimal outcomes (CC) and those generated by cautious strategies (DD) grows, increasing the losses from long-term mutual defection. As the gap increases, the likelihood that a player will take the risk of a cooperative strategy, thereby encouraging the other player to cooperate, is increased. Contingent strategies, like *Tit-for-Tat,* generally lead to more cooperative results.[65]

The above analysis demonstrates that a player in Assurance situations will cooperate if assured that the other players will also cooperate. Therefore, gaining reliable information regarding the players' intentions is crucial to cooperation in Assurance situations. Some scholars argue that the Assurance game does not constitute a genuine collective action problem, but rather presents only an "information problem."[66] Lack of information occurs frequently in the international arena. Players are expected to gather information regarding the expected behavior and expectations of the other players. This task may be realized, wherever possible, through pre-play communication and examination of the other players' records in similar situations. In iterated situations, the players also learn about others' intentions through the moves of the game itself. In sequential cases, the most efficient information-

64. As observed by Aumann, regardless of his/her own play, player 2 gains more if player 1 plays C. Thus, no matter what action is intended by player 2, he/she will tell player 1 that that he/she intends to play C. Player 1, of course, should not be assumed to believe Player 2. *See* FUDENBERG & TIROLE, *supra* note 9, at 21.

65. *See, e.g.*, SANDLER, *supra* note 1, at 83.

66. Elster, *supra* note 1, at 140; *see also* TAYLOR, *supra* note 3, at 19, 39; STEIN, *supra* note 22, at 30.

gathering strategy for a player is to start with cooperation.[67]

Without reliable information, the variables used to determine the probability of a player adopting a cooperative or noncooperative strategy include: (1) the extent of the gap between CC and DD; (2) the number of remaining stages of the game; (3) the discount rate (in iterated games); (4) the number of players; and (5) the magnitude of the risk generated by CD. Increasing the value of the first three variables increases the prospects for cooperative moves, while increasing the number of players and the magnitude associated with CD, decreases the prospects for cooperative moves.

Scholars have applied the Assurance game to various international situations in which attaining optimal results required cooperative moves by all participants.[68] Surprisingly, the model rarely has been applied to international environmental collective action problems.[69]

4. The Coordination Game

As in the Assurance game, all players in the Coordination game[70] have to cooperate in order to attain the optimal outcome. The central difference between these two game models is that while the Assurance game presents only one Pareto-equilibrium position, the Coordination game presents multiple Pareto-equilibria over which the players have divergent preferences. The normal form of this problem is presented in Figure 4.

67. Hugh Ward, *Testing the Waters: Taking Risks to Gain Reassurance in Public Goods Games*, 33 J. CONFLICT RES. 274 (1988). In this article, Ward analyzes an Assurance model in which a player is not certain whether the other players have Assurance or PD preferences.

68. *See, e.g.*, Kenneth W. Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, 50 LAW & CONTEMP. PROBS. 117 (1987); Robert Jervis, *From Balanced to Concert: A Study of International Security Cooperation*, 38 WORLD POL. 58, 67-68 (1985); Carlise Ford Rounge, *Institutions and the Free Rider: The Assurance Problem in Collective Action*, 46 J. POL. 154 (1984); STEIN, *supra* note 22, at 31; Ward, *supra* note 67, at 279.

69. *See, e.g.*, SANDLER, *supra* note 1, at 168.

70. The story of the Coordination game, also known as "The Battle of the Sexes," involves two players who wish to go to an event together but who disagree about whether to go to a football game or to the ballet. Each player gets a payoff of 2 if both go to his or her preferred event, a payoff of 1 if both go to the other's preferred event, and 0 payoffs if they are unable to agree. FUDENBERG & TIROLE, *supra* note 9, at 18; *see also* the original story in LUCE & RAIFFA, *supra* note 9, at 91.

		Player 2	
		S1	S2
Player 1	S1	2, 1	0, 0
	S2	0, 0	1, 2

Figure 4: Coordination Game

The preference ordering for player 1 is:

S1, S1 > S2, S2 > S1, S2 = S2, S1

And for player 2:

S2, S2 > S1, S1 > S1, S2 = S2, S1

The Coordination game has two *Nash equilibria* in pure strategy: (S1, S1) and (S2, S2). Both strategies are efficient. Each one, however, generates different payoffs to the players. The players are interested in coordinating on one of the equilibria positions. The collective action problem arises since they have conflicting preferences regarding the chosen equilibrium.[71]

This game represents a clear distributional problem,[72] which impedes cooperation. However, once the players agree on a cooperative solution, there are no significant incentives to depart from the coordination point, making the solution self-enforcing.[73] If pre-play communication exists, each rational player may announce that he or she would follow his or her preferred equilibrium point (e.g., S1 for Player 1), while the other player, seeking to avoid the worst results (S1, S2), is driven to the first preferred strategy.[74] Assuming that both players are rational and adopt this strategy, the above proposition does not aid in solving the game. On the other hand, in sequential games the first player to move may have a significant advantage since he or she is able to commit himself or herself in an earlier stage to the preferred equilibrium position. Meanwhile, the second player has no choice but to join the first player.

The prospects for cooperation are not necessarily decreased in N-player games (as in PD). Indeed, in some cases, the prospects are enhanced. Increasing the number of players impedes communication and

71. For a discussion of situations in which players converge on some "focal point" (a prominent position in terms of uniqueness, simplicity, or precedency), *see* THOMAS C. SHELLING, THE STRATEGY OF CONFLICT 69-72, 89, 92 (1960); RASMUSEN, *supra* note 9, at 28-29.

72. *See Coordination*, *supra* note 59, at 931-32; James D. Morrow, *Modelling the Forms of International Cooperation: Distribution versus Information*, 48 INT'L ORG. 387, 388 (1994) [hereinafter *Modelling*].

73. *Coordination*, *supra* note 59, at 932; STEIN, *supra* note 22, at 42.

74. LUCE & RAIFFA, *supra* note 9, at 91.

complicates bargaining, but does not increase the players' incentives to defect from the equilibrium point. While each player in games with a small number of players may have an incentive to depart (or threaten to depart) from the coordination point in an attempt to compel the others to accept his/her preferred point, the strategy's impact decreases as the number of players increases.[75]

In contrast to PD situations, the iteration of the Coordination game does not lead to better cooperative results. On the contrary, playing through time may become one of the destabilizing factors in Coordination situations. The magnitude of the distributional problem corresponds to the extent of the gap between the payoffs generated to the players in the different equilibria positions. This gap is relatively small in a one-shot game (i.e., 1 in Figure 4), but it increases together with the iteration of the game. Thus, a player willing to give up the relatively small additional benefit of his or her preferred equilibrium, in order to avoid the worst results, would find it more difficult as the gap grows with each iteration of the game.[76] The discount factor's impact upon the prospects for cooperation is very different from that in the PD. Decreasing the discount rate to zero in the Coordination game brings the players closer to the one-shot games. The decrease in the discount rate reduces future losses arising from compromise on the unfavorable equilibrium point. Therefore, decreasing the discount rate encourages the players to cooperate.

Players in Coordination situations are expected to misrepresent their private information. They are likely to attempt to convince the others that adopting their preferred equilibrium position will also further their own interests (i.e., that the situation is similar to the Assurance game). Players in Coordination situations have incentive to dissemble information; conceal or underrate unfavorable information, and exaggerate favorable data. Increasing the gap between the different equilibria positions enhances the distributional problem and intensifies the information problem. When the players do not trust messages conveyed by the other players, the likelihood of successful coordination is reduced.[77]

The Coordination game captures the essence of numerous collective action situations, in which several ways of attaining optimal results exist. The Coordination game is applied to various international contexts where the actors are interested in "meeting" each other in some coordinated position but have conflicting preferences over the particular meeting point. The prominent examples in the international arena include setting common standards for international communication,

75. *Coordination, supra* note 59, at 935-36.

76. *Coordination, supra* note 59, at 936. *See also Modelling, supra* note 72, at 411.

77. *Modelling, supra* note 72, at 400-06.

agreeing on radio-emergency frequency for civil aviation, and formulating an international system for the classification of goods for customs purposes.[78]

III. GAME THEORY AND ENVIRONMENTAL COOPERATION IN THE MIDDLE EAST

A. *The Prospects for Environmental Cooperation: Game Theoretical Analysis*

Having clarified the central notions and models of game theory, this article now turns to an examination of the major environmental problems in the Middle East. This Part analyzes two of the region's principal environmental problems: marine pollution in the Gulf of Aqaba and water contamination of the Mountain Aquifer. This section will also briefly discuss other regional environmental problems.

1. Marine Pollution in the Gulf of Aqaba

a. Background

The Gulf of Aqaba ("Gulf") is one of two northern extensions of the Red Sea, the other being the Gulf of Suez. The Gulf extends about 180 km from the Israeli and Jordanian shores in the north to the Strait of Tiran in the South, bordering the coastlines of Egypt and Saudi Arabia. It is both narrow, with an average width of only 18 km, and deep, with an average depth of 800 meters. The water in the Gulf is calm and the winds generally come from the north. The water is exceptionally clear, due to a very low concentration of nutrients and plankton. The Gulf's natural features create ideal conditions for an abundant and diverse aquatic system. At the heart of the ecosystem are the Gulf's world-renowned and exquisite coral reefs, which are home to myriad aquatic life forms.[79]

The four littoral states of the Gulf of Aqaba are Egypt, Israel, Jordan and Saudi Arabia. Aside from the intrinsic environmental value of

78. For more situations presenting the features of the Coordination game, *see* STEIN, *supra* note 22, at 42-43; Abbott, *supra* note 21, at 371-72, 374; *Coordination*, *supra* note 59, at 932; *Modelling*, *supra* note 72, at 390-93, 409-13.

79. Khalil Hosny Mancy, *Gulf of Aqaba Ecological Overview and Call to Action*, *in* PROTECTING THE GULF OF AQABA 19 (Deborah Sandler et al. eds., 1993) [hereinafter PROTECTING THE GULF OF AQABA]; A REGIONAL PROJECT BETWEEN EGYPT, ISRAEL, AND JORDAN: UPPER GULF OF AQABA OIL SPILL CONTINGENCY PROJECT 4, 6 (Eur. Comm'n, DG I B, External Relations, Brussels, 1995) [hereinafter UPPER GULF OF AQABA]; Grant James Hewison & Boaz Oren, *Protecting Sensitive Aquatic Habitats in the Gulf of Aqaba*, *in* PROTECTING THE GULF OF AQABA , *supra*, at 119.

its unique ecosystem, there are two principal reasons why the Gulf is of considerable importance to Egypt, Israel, and Jordan:[80]

The first is that the Gulf is an important transportation route for Jordan and Israel, and to a lesser degree, for Egypt. The Port of Aqaba is Jordan's only outlet to the sea, and the Port of Eilat is Israel's only gateway to the East. The regular ferry traffic inside the Gulf, between Nuweiba in Egypt and Aqaba, serves tourists and Egyptian workers in neighboring countries. Cargo traffic to Aqaba, as well as cargo and crude oil traffic to Eilat, dominates the maritime traffic in the Gulf. In 1993, the Port of Aqaba received 1,430 of the 1,615 vessels entering the Gulf through the Strait of Tiran. Oil tankers carrying crude oil from Egypt make up approximately one-third of the ship's calls to Eilat.[81]

The second reason is that the Gulf harbors several very popular tourist destinations, including unique coral reefs. The reefs attract a significant number of tourists from around the world. Israel and Jordan maintain large tourist resorts, mainly in Eilat and Aqaba. However, some facilities are found along the Egyptian coast (mainly in Taba, Nueiba, and Dahab). All three States continue to expand their existing resorts, rapidly making tourism the major source of employment and income in the area.[82]

The Gulf's precious environmental resources, maritime transportation and tourist industry are interrelated. While environmental pollution rarely affects maritime transportation, maritime transportation, and activities associated with it do affect the waters. For instance, accidents during cargo loading and unloading or crude oil terminal operations can have a significant impact on the Gulf's extremely fragile environmental resources. Furthermore, the success of the area's tourist industry largely depends upon the quality of the coast's environmental resources since most tourists engage in water activities like swimming, diving, and snorkeling. Ironically, however, the tourist industry remains one of the principal sources of marine pollution in the Gulf.[83]

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80. The Gulf is of lesser importance to Saudi Arabia. There are only a few small towns on the Saudi Arabian coast, and it seems that the government is not interested in developing tourist resorts in the area.

81. UPPER GULF OF AQABA, *supra* note 79, at 8.

82. *See* Roy B. Mann, *Tourism and Related Development Compatible with Aesthetic Resource Protection in the Gulf of Aqaba, in* PROTECTING THE GULF OF AQABA, *supra* note 79, at 143; Fouad Sultan, *Tourism Development Along the Gulf of Aqaba Coast: An Egyptian Perspective, in* PROTECTING THE GULF OF AQABA, *supra* note 79, at 177; UPPER GULF OF AQABA, *supra* note 79, at 8-9.

83. On the sources of pollution in the Gulf, see Zihad Jaber Alawneh, *Jordanian Environmental Laws, Institutions, and Treaties Affecting the Gulf of Aqaba, in* PROTECTING THE GULF OF AQABA, *supra* note 79, at 97, 98-102; Deborah Sandler, *Environmental Law and Policy for the Gulf of Aqaba: An Israeli Perspective, in* PROTECING THE GULF OF AQABA, *supra* note 79, at 69, 85-89; Mohammed I. Wahbeh, *An Agenda for Scientific Research in the Gulf of Aqaba, in* PROTECTING THE GULF OF AQABA, *supra* note 79, at 25, 28-

The Gulf of Aqaba area is undergoing a wave of economic development, a fact which poses significant risk to its fragile environmental resources. This is particularly true because the current utilization of the region's resources borders its carrying capacity. Given this state of affairs, any significant pollution is expected to generate harmful results to the Gulf ecosystem and, consequently, to the tourist industry.

b. Analysis: Israel and Jordan

Significant pollution originating from either Israel or Jordan generates similar negative payoffs for both parties. This is due to the geographic proximity of the two States' coasts and the marine pollution frequently generated in the Gulf by events close to shore, like mooring operations in the harbors, oil unloading, or sewage disposal.[84] Large amounts of pollutants originating from either State will first harm the coastal ecosystem of the originating State, and several hours later, the environmental resources of the neighboring State. An oil spill can drift from Jordan to Israel or from Israel to Jordan within six hours.[85] This type of pollution, especially if repeated, would significantly harm both parties' vital tourist industry.

To simplify the game theory analysis, assume that each party has two principal strategies, C and D. C refers to a cooperative strategy in which a party takes the appropriate preventive measures to avoid marine pollution, while D refers to a non-cooperative strategy in which a party does not take the required preventive measures. Significant pollution occurs if one of the parties defects (CD or DC). Pollution is avoided if both parties cooperate (CC), while serious pollution occurs if both parties adopt non-cooperative strategies (DD). Several assumptions enable the presentation of the parties' ordinal payoffs in a normal form (Figure 6). First, preventive costs are lower than the benefits generated by utilizing non-polluted environmental resources. Second, the preventive costs and the positive payoffs in the absence of pollution are similar for both parties. Finally, the worst possibility for each party is to take precautionary measures while still suffering the negative payoffs resulting from pollution.

31.

84. The likelihood of ship collision leading to major spills in the Gulf is remote. *See* UPPER GULF OF AQABA, *supra* note 79, at 10-11.

85. UPPER GULF OF AQABA, *supra* note 79, at 21.

Jordan

Israel	C	D
C	4, 4	1, 3
D	3, 1	2, 2

Figure 6: Ordinal payoff matrix for Jordan and Israel in the Gulf of Aqaba

Thus, the preference ordering for Israel and Jordan in this setting is:

CC > DC > DD > CD[86]

The structure of the interactive sub-setting between Jordan and Israel is that of the Assurance game and the attainment of the optimal outcome (CC) requires both parties to adopt cooperative strategies. This situation presents two Nash equilibria (CC and DD), but neither dominates the other. While CC equilibrium is clearly *Pareto superior* to DD, a rational actor cooperates only if inclined to believe that the other party will cooperate. Since the Gulf of Aqaba system presents an infinite iterated situation, the gap between the optimal and worst results grows, thereby fostering the prospects for mutual cooperation. The discount rates of Israel and Jordan are relatively high. The fact that both parties currently invest considerable resources in developing their regional tourist industries testifies to that effect. This factor increases the likelihood that both parties' strategies will converge on the mutual cooperative equilibrium.

The Assurance game's characteristics explain why Israel and Jordan have adopted the current cooperative strategies in the Gulf, leading to stable cooperation. In this sub-setting, a party generally departs from its cooperative strategy only if it expects that the other party will adopt a non-cooperative strategy. Thus, for instance, Jordan is expected to forgo its preventive measures if convinced that Israel is likely to refrain from adopting the required precautionary measures. Here, Jordan avoids the worst outcome of incurring both the preventive costs and the expected harmful results from significant pollution by "defecting" in advance. Information regarding the other party's expected behavior plays a vital role in such situations.

86. In CC, a party bears the preventive costs and benefits from utilizing Gulf resources in the absence of pollution. In DC, a party does not incur the preventive costs but sustains the damages arising from significant marine pollution. In DD, a party does not bear the preventive costs but suffers the harmful results generated by serious pollution. In CD, a party incurs the preventive costs and sustains the damages arising from significant pollution.

c. Egypt, Israel, and Jordan

The structure of the environmental setting between Egypt, Jordan, and Israel differs from that of only Israel and Jordan. Egypt, like Israel and Jordan, maintains a significant interest in sustaining and developing its tourist industry along the Gulf coast. The basic difference between the two settings derives from the geographic location of the parties and the circulation patterns within the Gulf. The prevailing winds are from north to south and the currents run from Jordan and Israel southward to the Egyptian coast. Thus, while pollutants from Jordan or Israel can travel to Egypt within 12 hours,[87] most pollutants from Egypt are not expected to even reach either Jordan or Israel.

Though significant pollution originating from the Egyptian coast is unlikely to pollute Israeli or Jordanian coasts, it may well cause some harm to other southern Egyptian coasts. The negative effects on other Egyptian coasts change in accordance with the location of the pollution's source. Pollutants originating in the *northern* Egyptian coasts (e.g., Taba) are likely to harm the originating coast, and then travel southward, inflicting environmental damage on the Egyptian coastal resorts in the south (e.g., Dahab). Pollutants originating in the *southern* coasts (e.g., Ras Nasrani), will travel southwards to the Red Sea and are not likely to harm other Egyptian coastal resorts. Thus, the further south the pollution's source, the greater is Egypt's externalization rate.

Externalization changes according to the geographic location of the pollution's source, generating different payoff structures for various Egyptian coasts. To simplify, the payoff structures of two representative cases are examined below: (a) the source of pollution is on Egypt's northern coast; and (b) the source of pollution is on Egypt's southern coast. The similar interests of Israel and Jordan *vis-a-vis* Egypt enable the insertion of either one as a player in the following matrices. The assumption is that Israel and Jordan converge on the same position, either CC or DD, *supra*. Employing the same assumptions and notations as in Figure 6, the normal form of the parties' ordinal payoffs for pollution originating in the *northern* Egyptian coast is presented in Figure 7.

87. UPPER GULF OF AQABA, *supra* note 79, at 21.

Israel/Jordan \ Egypt	C	D
C	4, 4	4, 3
D	2, 1	2, 2

Figure 7: Ordinal payoff matrix for pollution originating from Egypt's northern coasts.

Two prominent features arise from this matrix. First, from Israel or Jordan's point of view, Egypt's strategy will not affect their behavior. Israel or Jordan will cooperate as long as the other cooperates, regardless of whether Egypt cooperates. Under the present circumstances, CC > DD is true for both Israel and Jordan. Thus, C is the dominant strategy for each of them. Second, since Egypt is aware that C is the dominant strategy for Israel and Jordan, and since CC > DC for Egypt, C is also the dominant strategy for Egypt.[88] Egypt's preference ordering in this case reflects the Assurance game. If Jordan or Israel changes its current strategy and adopts a non-cooperative approach, D becomes the dominant strategy for Egypt (DD > CD for Egypt).

As one moves southward down the Egyptian coast, Egypt can externalize more of its pollutants to the Red Sea, thus changing the relationship between CC and DC. While it is clear that CC > DC remains true for pollution originating from northern coasts, the gap decreases as one moves southward. At some "critical point," CC will be equal to DD. When crossing the "critical point" on Egypt's southern coasts, DC becomes greater than CC. Figure 8 sets forth the normal form of the parties' ordinal payoffs for marine pollution originating from Egypt's *southern* coasts:

Israel/Jordan \ Egypt	C	D
C	4, 3	4, 4
D	2, 1	2, 2

Figure 8: Ordinal payoff matrix for pollution originating in Egypt's southern coasts

88. In CC, Egypt bears the preventive costs and benefits from utilizing the Gulf in the absence of pollution. In DC, Egypt does not incur the preventive costs but sustains the damage arising from significant marine pollution on the southern coasts. In DD, Egypt does not bear the preventive costs but suffers the harmful results generated by serious pollution. In CD, Egypt incurs the preventive costs and sustains the damage arising from significant pollution.

Egypt's ordering preference in this case is as follows:

DC > CC > DD > CD

In contrast to pollution originating from Egypt's northern coasts, Egypt's optimal combination in the present case is CD. Egypt's ordering preferences reflect the Prisoner's Dilemma structure. Jordan and Israel's positions, however, remain the same as for pollution originating in Egypt's northern coasts (Assurance preferences between themselves). In this case, C is still the dominant strategy for Israel and Jordan. Egypt, knowing their preference ordering, is expected to adopt its optimal strategy (DC), choosing not to invest significant resources to prevent pollution originating from its southern coasts.[89] Israel and Jordan will not be affected by Egypt's non-cooperative strategy and are not expected to press the latter to take preventive measures. Furthermore, even if Israel and Jordan threaten to employ retaliatory measures against Egypt for pollution originating from Egypt's southern coasts, such threats will be considered "*noncredible*"[90] and are unlikely to persuade Egypt to divert from its expected strategy. Clearly, the equilibrium resulting from the above matrix does not favor the protection of the environmental resources in the southern part of the Gulf.[91]

d. Future Development and the Need for Common Standards

Current utilization of the Gulf's resources stretches the limits of its environmental carrying capacity. As the three coastal States launch various projects to expand their tourist industries, the risk of overloading the region's natural resources remains acute, while the need for greater coordination increases. The seeds of cooperation already exist in the recent "Upper Gulf of Aqaba Oil Spill Contingency Project,"[92] but much more is needed to counter the expected environmental degradation.

Further measures should set common and more stringent standards for sewage discharge, (particularly industrial), prevention of leaks and spills from port facilities, and reduction of emissions of airborne chemicals like phosphates, potash, and bromide. There should be common rules to prevent dumping of wastes from private boats and for

89. Egypt externalizes its pollution from the southern coasts. It is possible that Egypt's relationships with the other coastal states outside the Gulf of Aqaba (in the Red Sea) will be similar to those in the Prisoner's Dilemma. That subject, however, exceeds the limits of this study.

90. As explained above, a player is not expected to take into account non-credible threats, i.e., threats that if carried out, cost more to the player who issues them than if they are not carried out. *See* discussion *supra* Part II.C(2).

91. Some methods to modify the current structure of settings susceptible to collective action failure will be dealt with, *infra*, in Part III.B.

92. *See* UPPER GULF OF AQABA, *supra* note 79, at 18-23; Ministry of the Environment, *Upper Gulf of Aqaba Oil Spill Contingency Project*, 18 ISR. ENVTL. BULL. 10 (1995).

the establishment of adequate port facilities to collect these wastes.[93] Establishing common standards is expected to generate an interactive situation characterized by the Coordination game's features, a subject dealt with later in Part III(C).

2. Water Contamination of the Mountain Aquifer

a. Background

Water is essential for survival and economic development in the semi-arid climate of the Middle East, and this is one of the scarcest resources in the region. According to water experts, Jordan, Israel, and the Palestinians are much below the "Water Stress Level" of 500 cubic meters per person per year.[94] Not surprisingly, the parties in the region have struggled fiercely over control and allocation of this precious and scarce resource.[95]

The Mountain Aquifer represents the largest water resource in the region, supplying 600 million cubic meters of water per year ("MCMY"). The Aquifer supplies approximately a third of Israel's annual water consumption and 90% of the Palestinians' consumption. The underground reservoir lies beneath the West Bank's mountains in the central part of the mountain ridge. The Aquifer consists of three major basins: the Yarkon Taninim basin (360 MCMY), the Nablus-Gilboa basin (140 MCMY), and the Eastern basin (100 MCMY). Of the 600 MCMY from the entire Aquifer, Israel and its Jewish settlements in the area use about 495 MCMY, while the Palestinians use about 105 MCMY.[96]

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93. In addition, a reduction in the number of active ports and marinas will save resources and enable better supervision over the port facilities which constitute a source of frequent pollution in the Gulf. Thus, the proposal to close Eilat Port and the proposal that the Aqaba Port will serve both Jordan and Israel may well lead to desirable results. *See* Dany Morgenstern, *Implementing Jordanian Option*, GREEN-BLUE-WHITE J. ENVTL. PROTECTION IN ISR. 8, 10-11 (Jan-Feb. 1995) (in Hebrew).

94. Hillel I. Shuval, *Approaches to Resolving the Water Conflicts between Israel and her Neighbors: A Regional Water-for-Peace Plan*, 17 WATER INT'L 133 (1992).

95. For a discussion on the history of the struggle over the allocation of water among the Middle Eastern States, *see* KATHRYN B. DOHERTY, JORDAN WATERS CONFLICT 3 (1965); MIRIAM R. LOWI, WATER AND POWER: THE POLITICS OF A SCARCE RESOURCE IN THE JORDAN RIVER BASIN 79-203 (1993); J. W. Eaton & D. J. Eaton, *Water Utilization in the Yarmuk-Jordan, 1192-1992, in* WATER AND PEACE IN THE MIDDLE EAST 93 (J. Isaac & H. Shuval eds., 1994) [hereinafter WATER AND PEACE]; Aaron Wolf & John Ross, *The Impact of Scarce Water Resources on the Arab-Israeli Conflict*, 32 NAT. RESOURCES J. 919, 926-48 (1992); Aaron Wolf, *Water for Peace in the Jordan River Watershed*, 33 NAT. RESOURCES J. 797, 799-806 (1993).

96. Eyal Benvenisti & Haim Gvirtzman, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 NAT. RESOURCES J. 543, 550-59 (1993); Haim Gvirtzman, *Groundwater Allocation in Judea and Samaria, in* WATER AND PEACE, *supra* note 95, at 205, 208-14. A slightly different assessment of the issue

Two central terms need definition before continuing the article. First, the *feeding area* is the surface area composed of permeable rock outcrops through which both rainwater and pollutants can penetrate the aquifer. Second, the *storage area* is that part of the aquifer where surface rocks are impermeable, serving as a "roof" covering the groundwater reservoir. Pumping water from the storage area is stable and cheap, and most of the wells pumping water from the Aquifer are in this area. The majority of the Mountain Aquifer's feeding area is outside Israel's pre-1967 borders, and is predominantly inhabited by Palestinians. However, a greater amount of the Aquifer's water volume is contained within Israel's 1967 borders.[97]

The physical properties of the particular aquifer determine its groundwater vulnerability to pollution.[98] The "DRASTIC" model, developed by the U.S. Environmental Protection Agency, assesses an aquifer's sensitivity to contamination using seven factors.[99] In light of the Mountain Aquifer's importance to the region, it is surprising that no one, using either DRASTIC or any other model, has completed a comprehensive assessment of the Mountain Aquifer's vulnerability to contamination. The available information regarding some of the DRASTIC central factors indicates, however, that most of the Aquifer remains highly vulnerable to anthropogenic pollution. For one, the Aquifer's hydraulic conductivity is relatively high.[100] The aquifer media includes

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appears in Hillel I. Shuval, *Geopolitical Aspects of Shared Aquifers: A Case Study of a Conflict*, *in* GROUNDWATER CONTAMINATION AND CONTROL 661 (Uri Zoller ed., 1994). *See also* Hillel I. Shuval, *Proposed Principles and Methodology for the Equitable Allocation of the Water Resources Shared by the Israelis, Palestinians, Jordanians, Lebanese and Syrians*, *in* WATER AND PEACE, *supra* note 95, at 481-86 (discussing the same issue); Wolf & Ross, *supra* note 95, at 924-25. For a more meticulous analysis of the structure of the Aquifer's sub-basins, see Dror Avisar, *The Impact of Pollutants from Anthropogenic Sources within a Hydrologically Sensitive Area; the Wadi Rabba* 44 (1996) (in Hebrew).

97. Gvirtzman, *supra* note 96, at 208, 212-13; Benvenisti & Gvirtzman, *supra* note 96, at 552-57.

98. Yehuda Bachmat and Martin Collin define groundwater vulnerability to pollution as "the sensitivity of its quality to anthropogenic activities which may prove detrimental to the present and/or intended usage-value of the resource." Yehuda Bachmat & Martin Collin, *Mapping to Assess Groundwater Vulnerability to Pollution*, *in* VULNERABILITY OF SOIL AND GROUNDWATER TO POLLUTANTS 3, 297 (W. van Duijvenbooden & H. G. van Waegeningh eds., 1987).

99. D.R.A.S.T.I.C. refers to the initial of each factor: Depth to water table, Recharge amount, Aquifer media, Soil media, Topography, Impact of the vadose zone, and Conductivity of the aquifer. *See* LINDA ALLER, DRASTIC: A STANDARDIZED SYSTEM FOR EVALUATING GROUND WATER POLLUTION POTENTIAL USING HYDROGEOLOGIC SETTINGS 14-22 (1985); *see also* Sara Secunda, et al., *Composite DRASTIC Land-Use Vulnerability Assessment of Groundwater in Israel's Sharon Region Utilizing GIS Technology* 4, *in* HYDROLOGICAL REPORT 1996 (Water Comm'n Hydrological Serv. & Ministry of the Env't, 1996).

100. BOYKO ET AL., UNDERGROUND WATER CONTAMINATION POTENTIAL IN WESTERN

many cracks and fractions, which create "short-cuts" through the geologic system,[101] while the soil media consists of primarily limestone and dolomite rock formations, allowing rapid infiltration of the soil by various pollutants.[102]

The three principal sources of water pollution within the Mountain Aquifer include, in order of their polluting impact: domestic, industrial, and agricultural pollution.[103] An inadequate infrastructure for treating wastewater in the inhabited parts above the aquifer is responsible for most of the domestic wastewater.[104] The population in this area includes approximately 1,121,900 Palestinians and 133, 200 Israeli settlers.[105] Most Palestinian cities and rural areas do not have adequate wastewater collection or treatment systems.[106] On the other hand, most

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SAMARIA 33 (1993) (in Hebrew, summary in English); Haim Gvirtzman, *The Hydrology of Judea and Samaria, in* JUDEA AND SAMARIA RESEARCH STUDIES-PROCEEDINGS OF THE FIFTH ANNUAL MEETING 269, 278 (1995) (in Hebrew, summary in English) [hereinafter *Hydrology*]; Haim Gvirtzman et al., *Water Reservoirs on the Western Slopes of Samaria for Preventing Floods in the Dan Region, in* JUDEA AND SAMARIA RESEARCH STUDIES-PROCEEDINGS OF THE FOURTH ANNUAL MEETING 315, 325 (1994) (in Hebrew, summary in English) [hereinafter *Water Reservoirs*].

101. V. RUDESKY ET AL., GROUNDWATER POLLUTION HAZARDS FROM THE BARKAN INDUSTRIAL ZONE 11 (The Geological Survey of Israel, 1993) (in Hebrew).

102. V. Rudesky, *The Impact of Barkan Industrial Zone Wastewater on Groundwater Quality, in* JUDEA AND SAMARIA RESEARCH STUDIES-PROCEEDINGS OF THE FOURTH ANNUAL MEETING, *supra* note 100, at 328; Gvirtzman, *Hydrology*, *supra* note 100, at 269-70.

103. *See generally* JEAN J. FRIED, GROUNDWATER POLLUTION 1 (1975) and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GROUNDWATER HANDBOOK 97 (2d ed., 1992) (discussing sources of groundwater pollution in general).

104. Feitelson and Abdul-Jaber state in their joint study that "[m]ost of the sewage generated in the West Bank and Gaza Strip, by Jews and Arabs alike, is not treated. Moreover, much of it flows over aquifer recharge areas." ERAN FEITELSON & QASEM HASSAN ABDUL-JABER, PROSPECTS FOR ISRAELI-PALESTINIAN COOPERATION IN WASTEWATER TREATMENT AND RE-USE IN THE JERUSALEM REGION 1 (1997).

105. Central Bureau of Statistics, Pub. No. 573, Statistical Abstract of Israel-1996, at 55 (1996).

106. *See* Jad Isaac et al., *The Palestinian Environmental Dilemma* 14 (International Conference on Ecological Development in the Middle East Paper, Feb. 7-14, 1995)[hereinafter *Dilemma*]; ISRAEL-PALESTINE CENTER FOR RESEARCH AND INFORMATION, *Workshop Session: Water Quality in Israel's Central District and the West Bank, in* OUR SHARED ENVIRONMENT: THE 1995 CONFERENCE 67, at 72-73 (Robin Twite & Robin Menczel eds., 1996). *See* THE APPLIED RESEARCH INSTITUTE OF JERUSALEM (ARIJ), ENVIRONMENTAL PROFILE FOR THE WEST BANK: HEBRON DISTRICT 55 (1995) [hereinafter ARIJ, HEBRON DISTRICT]; ARIJ, ENVIRONMENTAL PROFILE FOR THE WEST BANK: BETHLEHEM DISTRICT 46-49 (1995) [hereinafter ARIJ, BETHLEHEM DISTRICT] and 24 THE BIOSPHERE 26 (No. 3-4, Dec.-Jan. 1994-95) (in Hebrew), for a discussion on the situation in the Palestinian cities of Hebron and Bethlehem. Most of the Palestinian rural population and the inhabitants in the refugee camps dispose their wastewater into cesspits, septic tanks, absorption pits and open sewage channels. When these installations fill up, the raw wastes are disposed into the open wadis and fields. This wastewater directly infil-

Israeli settlements in this area have some collection systems, but in many the wastewater is dumped into the surrounding wadis and open fields.[107]

Agricultural activities above the Mountain Aquifer also harm its water quality, largely due to extensive utilization of agrochemicals, pesticides, fertilizers, and fluents for irrigation.[108] A significant part of the resident Palestinian population (about 50%) benefits directly from the intense agricultural activities undertaken in the area.[109] Farmers cultivating lands above the Aquifer regularly use agrochemicals. As a result, some underground contamination has already been traced.[110] In addition, the rural population above the Aquifer uses untreated sewage for irrigation, threatening the reservoir's water quality.[111]

Information on industrial pollution is scarce. Water experts consider factories owned by the Israeli population (especially in the Barkan industrial zone) the principal sources of industrial pollution.[112] The Israeli factories generate wastewater, some of which includes heavy metals and other dangerous substances. Many of the Israeli factories dump the wastewater into the wadis.[113] There are some Palestinian factories

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trates the aquifer or is carried into the water reservoir by the rain; ARIJ, BETHLEHEM DISTRICT, *id.* at 46-49. *See also* Mohammed Said Al-Hamaidi, *Palestinian Policy and Regional Environmental Cooperation*, PALESTINE-ISRAEL J. 15, 16-17 (1998).

107. BOYKO ET AL., *supra* note 100, at 3. *See, e.g.*, on Barkan settlement, Avisar, *supra* note 96, at 13-15. Some settlements have established purification installations but many of them are poorly maintained, *see, e.g.*, Avisar, *supra* note 96, at 13-15; THE BIOSPHERE, *supra* note 106, at 29; *Workshop Session: Water Quality in Israel's Central District and the West Bank*, *id.* at 72-73 (regarding the El-Kana settlement).

108. *See, e.g.*, Lea Muszkat, *Groundwater Quality: Problems and Solutions*, *in* OUR SHARED-ENVIRONMENT: THE 1994 CONFERENCE 70 (Robin Twite & Robin Menczel eds., 1995) [hereinafter THE 1994 CONFERENCE].

109. Agriculture accounts for 20 to 30% of the Palestinian GDP and the population's employment, *see* THE WORLD BANK, DEVELOPING THE OCCUPIED TERRITORIES: AN INVESTMENT IN PEACE 1 (1993) [hereinafter DEVELOPING THE OCCUPIED TERRITORIES]; Issac et al., *Dilemma*, *supra* note 106, at 5, 7-8; Jad Issac, *Sustainable Development and the Palestinians*, *in* THE 1994 CONFERENCE, *id* at 33, 36 and Jad Issac, *Environmental Protection and Sustainable Development in Palestine*, *in* OUR COMMON ENVIRONMENT 7,15 (Robin Twite & Jad Issac eds., 1994).

110. Karen Assaf, *Palestinian Water Resources-Water Quality*, *in* OUR COMMON ENVIRONMENT, *supra* note 109, at 279, 291-92; Issac et al., *Dilemma*, *supra* note 106, at 7-10; Said Assaf, *Overview of Some Traditional Agricultural Practices Used by Palestinians in the Protection of the Environment*, *in* THE 1994 CONFERENCE, *supra* note 108, at 17.

111. *See* ARIJ, BETHLEHEM DISTRICT, *supra* note 106, at 49 and ARIJ, HEBRON DISTRICT, *supra* note 106, at 57.

112. *See* BOYKO ET AL., *supra* note 100, at 25; Interview with Professor Hillel Shouval, Department of Environmental Studies, at the Hebrew University of Jerusalem (July 3, 1997) [hereinafter Shouval interview]; Interview with Dr. Stuart Wollman, Department of Environmental Studies, at the Hebrew University of Jerusalem (July 4, 1997) [hereinafter Wollman interview].

113. *See* Avisar, *supra* note 96, at 15; BOYKO ET AL., *supra* note 100, at 21-25 and

that generate industrial wastewater, particularly in the tanning and stonecutting industries, which is not pre-treated and is disposed of in a central network of cesspits.[114]

b. Analysis

The Palestinian Authority ("PA") currently controls only a small portion of the lands located over the Mountain Aquifer, though its jurisdiction is expected to expand significantly. Here, the central question concerns the prospects for Israeli-Palestinian cooperation once the PA gains control over a substantial part of the West Bank. Analyzing the prospects for cooperation in order to avoid water contamination requires an examination of two principal factors: (1) each party's positive payoffs from the use of uncontaminated water and (2) the negative payoffs associated with the implementation of the required preventive measures.

In terms of the latter, it is plain that the Palestinians hold the brunt of the burden. For the most part, avoiding contamination of the Aquifer involves an investment designed to prevent the infiltration of domestic wastewater into the underground reservoir. This requires the establishment of an adequate infrastructure for collecting and treating sewage. The financial resources needed to establish the system depends upon the number of people residing in the area. As noted above, almost 90% of the population in the area is Palestinian. According to experts, the required investment in an adequate sewage system in the West Bank is approximately $500 per person, which amounts to more than $600 million for the entire project.[115] With Palestinians making up almost 90% of the population, they would incur the greater share of the costs.

The Palestinians would also incur the greater share of costs associated with preventive measures against water contamination resulting from agricultural activities. Palestinian farmers perform most of the agricultural activities in this area. Agriculture plays a greater role in the Palestinian economy than in the Israeli economy.[116] Consequently,

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Rudesky, *supra* note 102, at 25.

114. *See* ARIJ, HEBRON DISTRICT, *supra* note 106, at 54-55 and ARIJ, BETHLEHEM DISTRICT, *supra* note 106, at 46.

115. Shouval interview, *supra* note 112.

116. 2.9% of the employed population in Israel works in the agricultural sector, which contributes about 4% to the Israeli GDP. *See* ISRAEL INSTITUTE OF PRODUCTIVITY, PRODUCTIVITY IN ISRAEL: INTERNATIONAL PERSPECTIVE 62 (1997) [hereinafter PRODUCTIVITY IN ISRAEL]; DEVELOPING THE OCCUPIED TERRITORIES, *supra* note 109, at 57. Agriculture accounts for 20 to 30% of the Palestinian GDP and employment. *See supra* text accompanying note 109. It is expected that the share of the agricultural sector in

the Palestinians' investment in the required preventive measures related to agricultural activities would be higher than the Israelis' investment.

Currently, industrial operations constitute the smallest source of water pollution in the Mountain Aquifer. Yet the detrimental effects of industrial operations may grow over the next decade. At present, most of the polluting factories in the area are Israeli owned. Under the current analysis, Israel would bear the greater share of preventive costs associated with industrial discharges. However, care should be taken not to overestimate these numbers, as industrial operations in this area constitute only a small share of Israel's overall industry. In addition, anticipated industrialization in the territories under the PA's jurisdiction suggests that the present allocation of preventive costs in the industrial sphere may increase, thus increasing the Palestinian's share of those costs.

An overall assessment of the parties' negative payoffs resulting from the implementation of the required preventive measures shows that the Palestinians would incur substantially more expenses than the Israelis. The gap is considerable with respect to the vast resources needed for the establishment of an adequate sewage system to avoid domestic pollution, and less substantial (but still significant) regarding agricultural pollution. At the moment, the Israelis would bear more preventive costs for industrial pollution.

One can estimate the positive payoffs generated to the parties from using uncontaminated water by examining the expected damage to each party from pollution of the Aquifer. Significant discharge of pollutants into the reservoir by either party will generate negative payoffs for both, since both parties share the same pool. The pollutants in the underground reservoir know no political boundaries. This does not mean that the positive payoffs generated to the parties from using uncontaminated water are the same.

Comparison of the quantities of water used by the parties does not lead to a clear answer. Indeed, two important factors lead to different conclusions. On the one hand, the fact that Israel's share in the Aquifer's waters is much greater than the Palestinians (currently 5:1) suggests that significant water pollution in the Aquifer will entail greater negative payoffs to the Israelis than to Palestinians. On the other hand, the Aquifer supplies 90% of the Palestinian annual consumption and only about a third of Israel's consumption. This indicates that the

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the Palestinian economy will decrease in the future, together with the processes of agricultural industrialization. In light of the current major role of agriculture in the Palestinian economic life, however, we may well anticipate that its share in the GDP will be much greater than the Israeli's share over the next decades.

loss sustained by Palestinians following a significant contamination will be larger than the loss sustained by Israel. Analysis of the timeframe in which the harmful results are anticipated and the parties' discount rates regarding such future losses, reveals asymmetric preferences.

It is precisely known how long it will take from the pollution's discharge until the Aquifer's extracted waters exhibit significant detrimental effects. Water experts claim this period will vary from several years to several decades in most cases of pollution.[117] The time interval introduces an important variable of the parties' discount rate regarding future losses. The discount factor has a major influence upon a party's willingness to cooperate in infinite iterated games.[118] The utilization of the Mountain Aquifer constitutes an infinite iterated situation,[119] and the economic resources available to the parties affect their respective discount rates. As Brown-Weiss observes in her book, "In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity," poor communities are not inclined to cooperate to secure future environmental gains and "desperate actors" are more predisposed to adopt short-term strategies.[120]

Recent economic data shows that Israel is considered a developed State, while the Palestinians are considered a developing nation.[121] In light of the considerable and pressing problems of unemployment and poverty faced by the Palestinian Authority,[122] it is clear that the Palestinians' discount rate regarding water contamination, expected to occur within several years to decades, is quite low. The situation in the Gaza Strip exemplifies the Palestinians' low discount rate regarding future water sources. Over-exploitation of the aquifer in the Gaza Strip, where one of the poorest communities in the Middle East lives, has led

117. Wollman interview, *supra* note 112; Interviews with Dr. Yehuda Bachmat, Israel Hydrological Service (Sept. 25, 1996) and Dr. Dror Gilad, Israel Hydrological Service (Jul. 3, 1997). *See also* Karen Assaf, *supra* note 110, at 291.

118. On the role of the discount rate in infinite games, *see supra* Part II.C(2-4).

119. The Aquifer is replenishable and allows infinite utilization. A persistent extraction beyond the replenishment rate, however, will terminate its existence. In the latter case, the structure of the setting will be similar to a zero-sum game.

120. EDITH BROWN-WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY. AND INTERGENERATIONAL EQUITY 162-63 (2d ed. 1989). *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (discussing common-pool resources and ways that they can be organized to avoid excessive consumption and administrative costs).

121. In 1992, the Israeli's annual GDP per capita was estimated at $16,600 while the Palestinian's annual GDP per capita was approximately $1700. *See* SHARIF S. ELMUSA, INSTITUTE FOR PALESTINE STUDIES, NEGOTIATING WATER: ISRAEL AND THE PALESTINIANS 22-23 (1996); *The Palestinian Economy*, PALESTINE-ISRAEL J. 106-07 (1998); and PRODUCTIVITY IN ISRAEL: AN INTERNATIONAL PERSPECTIVE, *supra* note 116, at 82.

122. *See, e.g.*, THE WORLD BANK, BACKGROUND NOTE ON THE ECONOMY 1-5 (Fourth Meeting of the Consultative Group for the West Bank and Gaza, 1996).

to saltwater intrusion into the reservoir and increased salinity.[123] Generally speaking, a low discount rate decreases the value of future gains or losses for a party.

Three main conclusions can be drawn from the above analysis. First, the Palestinians' expected preventive costs are substantially greater than those of Israel. Second, the Palestinians' discount rate is significantly lower than that of Israel. Finally, as a result of the second conclusion Israel's future positive payoffs are greater than the Palestinians.

Assuming that both Israel and the Palestinians have two principal strategies, C (cooperate) and D (defect), significant pollution results if one party cooperates and the other does not cooperate (CD or DC). Pollution is avoided if both parties adopt cooperative strategies (CC). Serious contamination takes place if both adopt non-cooperative strategies (DD). Figure 9 sets forth the normal form of the parties' ordinal payoffs for water contamination of the Mountain Aquifer.

		The Palestinians	
		C	D
Israel	C	4, 2	1, 4
	D	3, 1	2, 3

Figure 9: Ordinal payoff matrix for Israel and the Palestinians re-garding water contamination of the Mountain Aquifer.

The matrix reveals asymmetric preferences. The Palestinians' order of priorities is:

DC> DD > CC > CD[124]

123. *See* Karen Assaf, *supra* note 110, at 286-89; Reitse Koopmans, *Environmental Problems in the Gaza Strip*, *in* THE 1994 CONFERENCE, *supra* note 108, at 126, 128-29; Gaza Isam R. Shawwa, *Water Situation in the Gaza Strip*, *in* WATER AND PEACE, *supra* note 95, at 251; Ephraim Ahiram & Hanna Siniora, *The Gaza Strip Water Problem: An Emergency Solution for the Palestinian Population*, *id.* at 261.

124. In DC, the Palestinians do not bear the expensive costs of preventive measures but will suffer from significant pollution in the future. As explained above, future negative payoffs are significantly discounted by the Palestinians. In DD, the Palestinians do not incur the expensive preventive costs but will sustain serious water pollution in the future; the latter negative payoffs are significantly discounted. In CC, the Palestinians bear the expensive costs of preventive measures but will benefit from clean water for the long range; future gains, however, are significantly discounted. In CD, the Palestinians incur the expensive costs of preventive measures and will suffer significant pollution in the future; future losses are discounted but the considerable expenses incurred at present are not.

Note that the Palestinians' order of priorities is quite similar to a player in a PD game.[125]

Israel's order of priorities is:

CC > DC > DD > CD[126]

Israel's order of priorities is the same as in the Assurance game.[127]

An analysis of the above matrix reveals that strategy D is the *dominant strategy* for the Palestinians (DC>CC and DD>CD). In other words, the Palestinians are likely to prefer D regardless of Israel's action. Israel, aware that D is the Palestinians' dominant strategy, is likely to prefer strategy D as well (DD>CD). Thus, the resulting equilibrium is DD in which both parties prefer not take preventive measures. This equilibrium point represents the Palestinians' second-best alternative and Israel's third-best alternative. Needless to say, the DD equilibrium represents the worst environmental alternative.

Characterizing the Palestinians' ordering preferences as similar to a player's in an infinite iterated PD game may suggest that Israel should employ contingent strategies (like *Tit-for-Tat*), which normally motivate cooperation in such settings.[128] An analysis of the above matrix and the parties' particular properties reveals that Israel's exercise of a contingent strategy (polluting the aquifer if the Palestinians do so) is not likely to stimulate the Palestinians into cooperation. The Palestinians will feel the harmful consequences only after several years or decades. Motivating cooperation by contingent strategies in infinite iterated PD requires the players to have high discount rates.[129] As discussed above, the Palestinians' discount rate regarding future water contamination is quite low. More importantly, even if Israel attempts to remedy the problem of the Palestinians' low discount rate by threatening to employ harsh contingent strategies, such as the *Grim Trigger*,[130] the Palestinians' choice is not expected to change. Regardless of whether Israel cooperates, since D is the Palestinians' dominant strat-

125. The difference is that in the PD game CC>DD, and in our case DD>CC. *See supra* Part II.C(2) for a discussion of the PD game and its special properties.

126. In CC, Israel bears the preventive costs but will benefit from future uncontaminated water; Israel's future payoffs are not significantly discounted. In DC, Israel does not incur the preventive costs but will sustain the harmful results of significant water pollution in the future. In DD, Israel does not bear the costs of the preventive measures but will suffer a serious water contamination. In CD, Israel incurs the preventive costs and will sustain significant water pollution.

127. *See supra* Part II.C(3) for a discussion of the Assurance Game and its special properties.

128. *See supra* Part II.C(2) for a discussion on the role of contingent strategies, including *Tit-for-Tat*, in PD situations.

129. *See supra* Part II.C(2).

130. *See supra* Part II.C(2) for a discussion on the Grim Trigger strategy.

egy, they are unlikely to be motivated to cooperate in response to a harsh contingent strategy.[131]

In summary, the structure of the setting between Israel and the Palestinians is clearly asymmetric. The above analysis suggests that the prospects for cooperation regarding the aquifer setting are unlikely. Moreover, employment of contingent strategies is not likely to change the parties' preferences. Unfortunately, the lack of cooperation could result in long-term damage to the environment.

B. Employing Legal Mechanisms to Avoid Collective Action Failure

The above game theoretical analysis indicates that cooperation is not expected to be easily elicited regarding the use and maintenance of the southern part of the Gulf of Aqaba and the Mountain Aquifer. Having employed game theory's tools, it may be possible to suggest some international legal mechanisms to modify the structure of settings susceptible to collective action failure. The challenge revolves around creating international settings that are more favorable to international cooperation and exploring legal techniques available to international lawyers to further this end.

The most frequent tool employed by international law to change payoff structures is the formulation of substantive norms, which create new rights and obligations for States. Establishing a legal obligation to follow a particular course of action modifies the payoff structure to a party, who then must contemplate whether or not to pursue the legally required course of action. Although States usually react unfavorably to another State's harmful activities, their reaction is compounded when the detrimental act violates rights prescribed under international law.[132] Thus, a new legal norm binding parties to a cooperative strategy in a given sphere increases the negative payoffs generated to a player who breaches an obligation. For this reason, establishing a legal obligation to cooperate, for instance in a treaty, improves the likelihood of cooperation.

The importance of contingent strategies in eliciting cooperation[133] highlights the role of international rules regarding "countermeasures" designed to enhance cooperation. International treaty law and customary international law set particular limitations on the use of retaliatory measures.[134] As illustrated below, widening or narrowing the possibil-

131. This conclusion applies *a fortiori* to a milder contingent strategy, like *Tit-for-Tat*.

132. *See, e.g*, LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed., 1979).

133. *See supra* Part III.C(2-4) for a discussion of the role of contingent strategies to support cooperation.

134. *See, e.g.,* Article 60 of the 1969 Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969); Article 30 of the International Law Commissions' Draft Articles on State Responsibility; (1979) Y.B. INT'L L. COMM'N 115-22 (Vol. II, Part 2); (1992) Y.B.

ity of retaliation in a given area is likely to affect the prospects for cooperation in that sphere.

International law also supports the prospects for cooperation by iteration of interaction among the parties.[135] The establishment of joint institutions may be realized by enlarging the "shadow of the future".[136] Information is crucial to cooperation in some settings, such as Assurance situations. Indeed, as described below, legal mechanisms facilitating collection and dissemination of information have significantly contributed to the emergence and maintenance of international cooperation.

The mechanism of *linkage* may be of great importance to the future environmental regime in the Middle East. When a particular international setting is susceptible to collective action failure (for instance when it presents strong features of zero-sum or Chicken game),[137] international law can alter the structure of the game by establishing a *linkage* between several issue-areas. The structural features of the new setting, composed of the formerly separated domains, may provide the parties with adequate incentives to cooperate. As noted above, the environmental settings of the Mountain Aquifer and the southern part of the Gulf of Aqaba are significantly asymmetric, and the parties are not likely to adopt cooperative strategies.

Similar asymmetric features are prevalent in other environmental spheres in the Middle East, such as air pollution. Scientific evidence gathered in the recent decade, along with well-known data regarding the general air flow patterns in the Middle East, show that Israel "exports" significant amounts of particulate sulfate and ground-level ozone (O3) to the West Bank, and probably to Jordan.[138] The wind regime in

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INT'L L. COMM'N 31-55 (Vol. II, Part 2).

135. *See supra* Part II.C(2-3) for a discussion on the role of iteration to elicit cooperation. *See generally* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L. J. 139 (1996) (discussing iteration in the international law of treaties).

136. Duncan Snidal, *The Politics of Scope: Endogenous Actors, Heterogeneity and Institutions*, *in* LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS 47 (Robert O. Keohane & Elinor Ostrom eds., 1995) [hereinafter LOCAL COMMONS AND GLOBAL INTERDEPENDENCE]. *See* Benvenisti, *supra* note 58, at 410-13 (discussing the role of institutions and how they can cooperate to intensify interactions, especially regarding the utilization of shared freshwater resources).

137. On the Chicken Game, *see generally* Hugh Ward, *Three Men in a Boat, Two Must Row: An Analysis of a Three-Person Chicken Pregame*, 34 J. CONFLICT RESOL. 371 (1990); Barton L. Lipman, *Cooperation Among Egoists in Prisoners' Dilemma and Chicken Games*, 51 PUBLIC CHOICE 315, 316 (1986); Ward, *supra* note 67, at 354, 367-69.

138. *See* Menachem Luria et al., TRANSPORTATION OF AIR POLLUTANTS FROM ISRAEL TO THE JORDAN VALLEY 56 (1996) (in Hebrew); Yossi Sachi et al., *Airborne Measurements of Ozone Levels over Central Israel*, *in* JUDEA AND SAMARIA RESEARCH STUDIES-

the region, mostly from northwest or northeast to the east,[139] and Israel's eastern neighbors' modest level of industrial activity results in a situation in which transboundary air pollution in the opposite direction is negligible (from the Palestinian territories and Jordan to Israel).

Asymmetric environmental settings occur regularly in the international arena, frequently inhibiting the emergence of cooperation.[140] Asymmetric preferences often lead the less-interested parties to reject a legal regime binding them to significant costs.[141] If they do join, they often tend not to comply with the agreement's main obligations. When any of the major polluting parties adopt this strategy, the overall effectiveness of the environmental regime is significantly undermined. International law may enhance the prospects for cooperation in such asymmetric settings by creating a link between the legal regimes to be established for each particular environmental sphere. For instance, a regime aiming to reduce transboundary air pollution in the Middle East may be linked to a regime designed to avoid water contamination of the Mountain Aquifer.

The technique of legal linkage addresses two basic problems arising in asymmetric environmental settings. First, a legal regime that combines several environmental spheres can provide the less-interested party in each domain with an incentive to join the comprehensive regime. Second, the establishment of a combined regime widens the opportunities for contingent strategies, which are capable of eliciting co-

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PROCEEDINGS OF THE FIFTH ANNUAL MEETING 339, 340-341 (1995) (in Hebrew; summary in English); 2 Mordechai Peleg et al., *Airborne Measurements of Ozone Levels over Central Israel, in* PROCEEDINGS OF THE 10TH WORLD CLEAN AIR CONGRESS 292, 294 (1995); Menachem Luria et al., *The Formation of O3 over Israel: A Growing Concern and a Potential International Issue, in* PRESERVATION OF OUR WORLD IN THE WAKE OF CHANGE 13-16 (1996).

139. Uri Dayan, *Climatology of Back Trajectories from Israel Based on Synoptic Analysis*, 25 J. CLIMATE & APPLIED METEOROLOGY 591 (1986).

140. Asymmetric preferences, however, may support cooperation in some settings. For articles discussing conflicting views on whether heterogeneity impedes or supports the emergence of environmental cooperation, *see* Lisa L. Martin, *Heterogeneity, Linkage and Commons Problems, in* LOCAL COMMONS AND GLOBAL INTERDEPENDENCE, *supra* note 136, at 73; Duncan Snidal, *The Politics of Scope: Endogenous Actoers, Heterogeneity and Institutions, id.* at 47 and Ronald B. Mitchell, *Heterogeneities at Two Levels: States, Non-State Actors and International Oil Pollution, id.* at 239-40.

141. For example see the position of the United Kingdom, one of the main exporters of sulfur in Europe, regarding the agreement concluded under the auspices of UNECE to reduce sulfur emissions. Armin Rosencranz, *The Acid Rain Controversy in Europe and North America: A Political Analysis, in* INTERNATIONAL ENVIRONMENTAL DIPLOMACY 173-85 (1988); Johaan G. Lammers, *The European Approach to Acid Rain, in* INTERNATIONAL LAW AND POLLUTION 265, 273 (1991); Amy A. Fraenkel, *The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation*, 30 HARV. INT'L L. REV. 447, 463, 473-74 (1989).

operation in competitive settings. A party who cannot adopt retaliatory measures within a particular sphere[142] may find new opportunities in an expanded regime. These factors suggest that, generally, the broader the scope of the regional environmental regime in the Middle East (in terms of the amount and diversification of interests involved), the more the parties are likely to undertake and comply with its provisions.

Establishing a legal link between the Middle East's various environmental issues enhances the probability that more parties will implement the provisions of the regional regime. Still, such legal linkages cannot always remedy the problem of asymmetric preferences. One particular party may be relatively disinterested in all environmental issues covered by the regional regime. Transboundary air pollution from Israel, for instance, is not expected to significantly affect Syria and Lebanon. They represent the "upstream parties" in the Jordan River basin and the Mediterranean Sea, and they have no significant interest in the Gulf of Aqaba. Pulling such "persistently" disinterested parties into the regional effort may require a legal linkage between the regional environmental regime and a non-environmental regime.[143]

While legal linkages may significantly enhance the effectiveness of any future environmental regime in the Middle East, they also raise numerous questions. For instance, which legal field is most appropriately to be linked with the environmental sphere? Clearly, the linked field should be of significant interest to all parties who are likely to affect the quality of the region's principal environmental resources. It must also represent a relatively stable domain, in that it acknowledges the parties' long-standing interests.

The field of commercial relations among the Middle Eastern parties generally meets the above criteria.[144] The legal linkage between issues of trade and the environment is well established in international environmental treaties, such as the Ozone Layer agreements.[145] While much attention has recently been devoted to the legal problems accom-

142. For example, Israel, with regard to water contamination of the Mountain Aquifer (*see* Part III.A(2)), or the Palestinians, with regard to air pollution (*see* Part III.B).

143. *See, infra*, for a discussion on the possible issue-areas to be linked with the future environmental regime.

144. On the current and prospective commercial relations between the parties in the Middle East, *see* Hisham Awartani, *Palestinian-Israeli Economic Relations: Is Cooperation Possible?*, *in* THE ECONOMICS OF MIDDLE EAST PEACE: VIEWS FROM THE REGION 281 (1993) [hereinafter THE ECONOMICS OF MIDDLE EAST PEACE]; Natan Zusman, *Trade Agreements as a Part of Peace Agreements-An Historical View*, 4 ECON. Q. 630 (1994); Ephraim Kleiman, *Some Basic Problems of the Economic Relationships between Israel, the West Bank and Gaza*, *in* THE ECONOMICS OF MIDDLE EAST PEACE, *id.* at 305; Tal Sadeh, THE ECONOMIC DESIRABILITY OF MIDDLE EAST EASTERN MONETARY COOPERATION 15-18 (The Helmut Kohl Institute for European Studies Working Paper 1/97, 1997).

145. *See, e.g.*, Article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1550 (1987).

panying the linkage between environment and trade,[146] the option remains a viable one for the Middle Eastern environmental regime. The commercial sphere offers relatively significant and stable benefits to all parties in the region. Moreover, its importance is expected to grow, thereby enlarging the range of contingent measures to support effective cooperation.

Yet establishing a linkage between the environmental and commercial spheres may expose environmental resources to adverse effects triggered by cross-sector retaliations. A party within the regional framework may invoke another party's alleged violation of an agreement's commercial provisions in order to justify noncompliance with its environmental obligations. If frequent enough, such cross-sector retaliatory measures could significantly harm the region's environmental resources. The problem, however, has a legal solution.

Legal norms may allow cross-sector retaliation in one direction. With respect to the environment, this means admission of retaliatory measures for protecting the environment, with a prohibition to operate such measures against environmental resources. For example, the technique of "one-way retaliation" frequently occurs under international human rights law. While various countermeasures, including trade sanctions, are admissible to protect human rights, reprisals involving human rights violations are strictly forbidden.[147]

C. *Information and Environmental Cooperation in the Middle East*

Information plays a major role in game theoretical analysis. The collection and dissemination of reliable information often[148] fosters the prospects for cooperation. This part of the article examines the role of information in the Middle East's environmental settings and suggests some legal means for improving the flow of information between the parties.

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146. Among the endless list of publications on this subject, see DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 3 (1994); C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT 5 (1994); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 AM. J. INT'L L. 700 (1992); Edith Brown-Weiss, *Environment and Trade as Partners in Sustainable Development*, 86 AM. J. INT'L L. 728 (1992).

147. *See* Article 60(5) of the 1969 Vienna Convention on the Law of Treaties, *supra* note 134; (1979) Y.B. INT'L L. COMM'N, *supra* note 134, at 116; (1992) Y.B. INT'L L. COMM'N, *supra* note 134, at 32-33; OMER YOUSIF ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 99-104 (1988).

148. It should be noted that complete information may hinder cooperation in some settings. This is clearly the case in PD situations in which cooperation may arise where the parties lack information regarding the number of the remaining rounds to be played; on infinite PD games, *see* Part II.C(2).

1. Environmental Standards and Coordination Games

Current use of the Gulf of Aqaba and the Mountain Aquifer is stretching their respective environmental capacities. Moreover, the expected wave of economic development in the region poses significant perils to their sustainable use. The need for regional environmental standards in the Gulf of Aqaba[149] applies *a fortiori* to the crucial water reservoir of the Mountain Aquifer. Ensuring future sustainable use of the Aquifer's water requires standards for establishing and maintaining adequate sewage infrastructure, as well as for the content of irrigation fluents in the areas above the aquifer.[150]

The formulation of common standards for Middle Eastern parties in the environmental field should generate an interactive setting, characterized by the features of the Coordination game. Such a setting creates multiple *Pareto equilibria* positions over which the players have divergent preferences. Different equilibiria positions generate a distribution problem since each player wants the other to converge on his or her preferred position. In the Gulf of Aqaba, for instance, Israel is expected to require strict emission standards regarding pollution emitted from phosphates (transmitted from Jordan),[151] while Jordan is likely to insist on more stringent standards for port facilities dealing with loading and unloading crude oil (located in Eilat's Port). The fact that the Gulf of Aqaba represents an infinite iterated situation, and that the parties have relatively high discount rates, intensifies the distribution problem.[152]

Parties in Coordination settings are expected to misrepresent their private information.[153] This leads to a situation in which a party does not trust the information provided by the other players, thus decreasing the prospects for successful coordination. The tense and suspicious relationships in the Middle East, particularly between the Israelis and the Palestinians, exacerbate this problem. Entrusting the task of collection and analysis of relevant information to a professional third party may mitigate the informational problem (e.g., a private consultant or research institute specializing in the particular environmental field). These specialists must be authorized to travel freely within the territories of the relevant parties, in order to accomplish their objectives. Needless to say, the parties should be bound to facilitate these operations by, among other things, providing the specialists with all

149. *See supra* Part III.A(1).

150. For more detail on this problem, *see supra* Part III.A(2).

151. *See* Maher F. Abu-Taleb, *Environmental Management in Jordan: Problems and Recommendations*, 21 ENVTL. CONSERVATION 35, 36 (1994).

152. On the impact of the discount factor and iteration on the prospects for cooperation in the Coordination game, *see supra* Part II.C(4).

153. *See supra* Part II.C(4).

necessary data. Finally, in order to foster trust in the specialists, the parties' representatives should be present in both information gathering and analysis.

The process of agreeing upon environmental standards features elements found in the Coordination game, but their *implementation* is another matter. In a classic Coordination game, once the players agree on a cooperative solution, their incentive to depart from the coordination point diminishes, and the solution becomes self-enforcing.[154] This is not necessarily the case when implementing environmental standards in different environmental settings. For instance, the implementation of standards to set up a sewage infrastructure in the Palestinian cities above the Mountain Aquifer represents the features of the Prisoner's Dilemma. In such cases, the standards are not "self-enforcing" and their implementation requires relatively strong monitoring and enforcement mechanisms.[155]

2. Conveying Assurances and Information

The above analysis of the structure of the Middle Eastern environmental settings reveals that the Assurance game reflects the relationships between Israel and Jordan in the Gulf of Aqaba. The Assurance game also reflects the relationship between Egypt and Israel or Jordan in the northern part of the Gulf; and Israel's preferences regarding the Mountain Aquifer. Information regarding the other party plays a crucial role in Assurance situations. A player in such a setting is likely to cooperate if he or she expects the other players to cooperate as well. A cooperating party is likely to depart from his or her cooperative course if he or she expects the others to adopt a non-cooperative strategy.[156] A lack of information and the resulting atmosphere of uncertainty might lead a player to adopt a non-cooperative strategy.[157]

The importance of information in Assurance situations demonstrates the need for an adequate mechanism to ensure transparency. For example, an effective legal mechanism should prescribe explicit and detailed provisions binding the parties to prepare a comprehensive Environmental Impact Assessment (EIA) regarding any planned measure with a potentially transborder environmental impact. Parties should transmit copies of the EIAs to the other parties in each environmental setting. Establishing a forum for the exchange of information and consultations on planned projects is also highly desirable.

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154. For detail, *see supra* Part II.C(4).

155. *See* Snidal, *Coordination*, *supra* note 59, at 938.

156. *See supra* Part III.C(3).

157. That may be the case, for instance, where the negative payoffs generated to the cooperative party in CD are substantial and the expected damage is irreversible.

3. Contingent Strategies and Information

As in Assurance situations, information plays an essential role in the operation of contingent strategies to support cooperation, like infinite PD situations. As noted above, the possibility of effective retaliatory measures is crucial for attaining environmental cooperation in the comprehensive Middle Eastern regime.[158] Countermeasures are triggered when there is information indicating that the other player has adopted a non-cooperative strategy. In the absence of reliable information regarding measures taken by the other parties, the effectiveness of contingent strategies decreases. Similarly, unreliable information may generate unjustified "retaliatory" measures against a cooperative party. This may result in the collapse of an otherwise successful cooperation.

These observations lead to the conclusion that a reliable monitoring mechanism is imperative to ensure environmental cooperation in the Middle East. The first step is to set out detailed provisions requiring the parties to provide data on the state of environmental resources under their jurisdiction, as well as the relevant measures to protect the environment they have already undertaken. Farming out some of the central functions to a panel of specialists (e.g., for inspections and data analysis) would enhance the reliability of the information gathered. In turn, this would promote the prospects for cooperation.

IV. CONCLUSION

This article demonstrates that combining game theory and international law enhances the prospects of international environmental cooperation. The concepts and models of game theory often assist scholars and policy-makers in identifying why cooperation failed in a given international setting. It may also aid them in predicting settings that are more susceptible to collective action failure. More importantly, game theoretical tools can be used to alter the current competitive settings, while serving as a planning tool for the construction of international regimes more suitable to stable cooperation. Legal mechanisms that draw on game theory's insights can increase the likelihood of future cooperation in the Middle East. These mechanisms include legal linkage between particular issue-areas, adequate rules regarding retaliation, and norms regarding dissemination of information. If the respective parties adopt these legal mechanisms it will unquestionably promote environmental cooperation in the Mountain Aquifer and the Gulf of Aqaba.

As with any handy tool, users should be aware of game theory's limitations. The advantages of combining game theory and interna-

158. *See supra* Part III(B).

tional law should not disguise its inherent imperfections.[159] Game theoretical analysis does not always lead to a unique equilibrium. Indeed, in many cases, multiple equilibria exist. When this occurs, as in the Coordination game, game theory does not help direct one to the particular outcome of the game.[160] Nonetheless, game theoretical analysis frequently narrows the number of possible solutions and provides a limited range of possible outcomes.

Game theory assumes, *inter alia*, that the players have predetermined goals and that they strive to attain these goals through their actions.[161] The theory does not explain which factors motivate a player to adopt a certain preference and how this preference is modified over time. The process of emerging and changing preferences is exogenous to game theory. Additionally, some collective action failure situations are not amenable to structural alteration designed to support cooperation. In others, the cost of structural change is prohibitive.[162] Where this is the case it would be more realistic to explore methods of modifying the players' preferences, rather than changing the payoffs aimed at satisfying these preferences.

Game theory does not aim to explain how preferences are formed. As noted above, game theory focuses on one set of variables (payoffs, strategies, information, iteration, discount factors, etc.) influencing decision-makers, but it does not represent a comprehensive theory exhausting all factors involved in international cooperation. Factors such as the personal characteristics of the decision-makers or social values prevailing in their community, which may affect the decision-makers' choices, are exogenous to game theoretical analysis. The absence of these factors is a central shortcoming of game theory. Yet it also underscores the theory's essential goal of simplifying and abstracting complex social phenomena into formal models. Focusing on one set of variables facilitates rigorous analysis and the exploration of interplay between the variables involved in collective action, such as discount factors and cooperative behavior.

Legal mechanisms, such as retaliatory rules and linkage arrangements, are valuable tools in encouraging international environmental cooperation. However, the law's capacity to modify existing structures

159. For detail regarding the limitations of game theory, *see* KEN BINMORE, ESSAYS ON THE FOUNDATIONS OF GAME THEORY 5-21 (1990); KREPS, *supra* note 38, at 91-132, 177-83; HEAP & VAROUFAKIS, *supra* note 9, at 12-18.

160. *See* MARTIN HOLLIS, THE PHILOSOPHY OF SOCIAL SCIENCE 137 (1994); KREPS, *supra* note 38, at 95-102.

161. *See supra* Part II.A. This assumption reflects the instrumental sense of rationality. *See* SHAUN H. HEAP, RATIONALITY, IN THE THEORY OF CHOICE: A CRITICAL GUIDE, 4-5 (1992); HEAP & VAROUFAKIS, *supra* note 9, at 5.

162. Interactive settings, which are hardly amenable to structural change will be dealt further below.

depends upon numerous factors. These include the scope of the particular setting and the gap between the payoffs generated to the players from cooperative and non-cooperative strategies. Generally, the smaller the setting's dimensions in terms of the extent and the value of the involved resources, the actors' strength, etc., the easier it is to change its structure. Similarly, legal intervention to support cooperation in competitive settings is more viable when there is a minimal payoff gap (in favor of non-cooperation). Establishing a legal linkage between several issue-areas, however, can remedy the problems associated with large-scale settings and substantial payoff gaps. Linkage makes it possible to mobilize adequate resources from different domains to support cooperation in problematic settings.

In conclusion, both game theory and international law have inherent limitations. These limitations occasionally limit their ability to modify the structure of international settings susceptible to collective action failure. Nevertheless, the combination of game theoretical analysis and international law offers scholars and policy-makers important insights in devising suitable legal mechanisms that support international environmental cooperation.

WHY NAFTA VIOLATES THE CANADIAN CONSTITUTION

AVI GESSER*

I. INTRODUCTION

With the proliferation of international economic treaties over the last decade, many of the traditional hallmarks of state sovereignty continue to erode. Each new round of negotiations on transnational economic integration, such as those surrounding the Multilateral Agreement on Investment[1] and the creation of the World Trade Organization ("WTO"),[2] challenges the very constitutional structures of the negotiating parties. As the states of the European Union have learned, many of the benefits of cross-border economic integration cannot be realized without relinquishing some of the old characteristics of independent statehood. In many instances, the new economic order requires significant reinterpretation of (or outright judicial amendment to) national constitutions.[3] This same dilemma now faces the countries of North America: what conflicts exist between their international trade obligations created by treaty and their national constitutions and how will these incongruities be resolved?

In December 1992, the governments of Canada, the United States,

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1. Multilateral Agreement on Investment: Consolidated Text and Commentary, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Organization for Economic Cooperation and Development, OECD Doc. DAFFE/MAI(97)1/REV2 (May 14, 1997); *see also Multilateral Agreement on Investment: Report of the MAI Negotiating Group*, OECD Doc., Annex (May 21, 1997).

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

3. *See* cases in which national courts of European Union countries have adopted the supremacy of European law, even where the state's constitution suggests otherwise: Internazionale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] 37, 271 (1974) (F.R.G.), [1974] 2 C.M.L.R. 540 (1974); SpA Granital v. Amministrazione delle Finanze dello Stato, Corte costituzionale [Corte cost.] [Italian Constitutional Court], 8 jun. 1984, n.170, Guir. It. 1984, I, 1521, [1984] 21 C.M.L.R. 756 (1984) (Italy); Case 213/89, Regina v. Secretary of State for Transport *ex Parte* Factortame, Ltd., [House of Lords] 1990 E.C.R. I-2433, [1990] 3 C.M.L.R. 1 (1990) (Gr. Brit.).

and Mexico signed the North American Free Trade Agreement ("NAFTA"),[4] creating a North American trading bloc. NAFTA was designed to phase out tariffs and establish a free market framework between the signatories. Its objectives include eliminating barriers to trade, promoting conditions of fair competition, increasing investment opportunities, and establishing procedures for the resolution of disputes.[5]

Since NAFTA was signed, several articles have been written on the compatibility of certain NAFTA obligations with the national constitutions of the signatory states. Primarily, the debate has focused on whether the Articles of NAFTA which allow countries to settle certain trade disputes before Binational Panels violate the American[6] or Mexican constitutions.[7] In addition to the significant academic debate, this issue has generated two formal proceedings in the United States Federal Courts challenging the constitutional validity of NAFTA on the basis that the Chapter 19 Binational Panels process amounts to an unconstitutional relinquishment of sovereign powers.[8] Although these challenges did not succeed, the controversy has not been resolved. Despite the legal activity in the United States, thus far the issue of the consistency between NAFTA obligations and the Canadian Constitution has not generated much interest. However, two recent legal decisions may spark interest in this issue north of the 49th parallel.

Part of the reason that NAFTA has not been challenged in Canada is that public sentiment has not reached the level of animosity regard-

4. North American Free Trade Agreement, Oct. 7, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) & 32 I.L.M. 605 (1993) [hereinafter NAFTA].

5. *Id.* art. 101.

6. *See* Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX AND BUS. LAW 101 (1995); Denis J. Edwards, *NAFTA and Article III: Making a Drama Out of a Crisis*, NAFTA: LAW & BUS. REV. AMS., vol. I, No. 2, 69 (1995); Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L. L.J. 141 (1994); Gregory W. Carman, *Resolution of Trade Disputes By Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality*, 21 FORDHAM INT'L L.J. 1 (1997); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

7. Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies*, 3 SW. J.L. & TRADE AM. 431 (1996).

8. The first case was Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. Ct. App. filed Sept. 14, 1994, withdrawn by voluntary motion to dismiss Jan. 5, 1995) arising out of the Extraordinary Challenge Committee (ECC) proceeding, In re Certain Softwood Lumber Products from Canada, ECC-94-1904-01USA (Aug. 3, 1994). This action was withdrawn on the basis of the settlement reached in "Lumber IV." The second case was American Coalition for Competitive Trade (ACCT) v. United States, No. 97-1036 (D.C. Cir. Ct. App. Nov. 14, 1997) (complaint and petition for summary judgment). The case was dismissed unanimously by the U.S. Court of Appeals on the basis that ACCT did not have legal standing to bring the case against President Clinton or the U.S. government. *See* Timothy Burn, *Judges Dismiss Challenge to NAFTA*, WASH. TIMES, Nov. 15, 1997, at C1, *available in* 1997 WL 3689516.

ing international trade agreements that it has in the United States. However, in May of 1997, Canada lost an appeal before the WTO Appellate Body. The case, *Certain Measures Concerning Periodicals*,[9] held that several measures Canada was using to protect its magazine industry from the onslaught of American competitors violated obligations under the General Agreement on Tariffs and Trade ("GATT").[10] The decision was viewed by many Canadians as an affirmation of their fears that the cost of free trade with the United States would be the eventual loss of Canadian culture. For many Canadians, that is a price not worth paying, and the response to the decision was harsh.[11] While Canada has had many bitter trade disputes with the United States (e.g. softwood lumber,[12] durum wheat,[13] pacific salmon,[14]) they have generally involved goods that do not directly affect the average Canadian. Because the decision in the *Periodicals* case threatened the commercial viability of many Canadian magazines, it demonstrated to the Canadian public the potential impact of international trade agreements on Canadian identity.[15] As such, it is probably only a matter of time before the storm brewing in America over NAFTA's constitutionality blows into Ottawa.

The second decision that may bring NAFTA's constitutionality into question in Canada is less well known. In 1995, the Supreme Court of Canada decided the case of *MacMillan Bloedel v. Simpson*,[16] which held that the Canadian Parliament could not delegate core functions of the superior courts to inferior courts or administrative tribunals.[17] As will be discussed below, this decision raises serious doubts as to the constitutionality of the NAFTA dispute resolution process.

In anticipation of a constitutional challenge that is likely to come before a Canadian court in the near future, this article examines NAFTA's binational dispute resolution system and its compatibility with Sections 96 to 100 of the Canadian Constitution. Part II describes the NAFTA dispute resolution mechanism, while Part III briefly outlines constitutional concerns over NAFTA in Canada, the United States,

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9. *Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body*, WT/DS31/AB/R, June 30, 1997, *available in* 1997 WL 432125, 1 (W.T.O.).

10. General Agreement on Tariffs and Trade, T.I.A.S. No. 1700, 55 U.N.T.S. 188.

11. *See* Marci McDonald, *Menacing Magazines: Ottawa Faces Another Threat From Washington*, MACLEAN'S, March 24, 1997, at 54; John Schofield, *Publish or Perish: Canada's Magazine Industry Faces an Uncertain Future*, MACLEAN's, June 2, 1997, at 44.

12. *See* In re Certain Softwood Lumber Products From Canada, Extraordinary Challenge Committee *(ECC) proceeding*, ECC-94-1904-01USA (Aug. 3, 1994).

13. *See* Marjorie Benson, *The NAFTA Durum Dispute and the Canada Grain Act: A Case Study in Institutional Development*, 5 CONST. F. 82 (1994).

14. *See* In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, United States-Canada Free Trade Agreement Binational Panel Review, Panel No. CDA-89-1807-01 (Oct. 16, 1989), 12 Int'l Trade Rep. (BNA), at 1026 (1991).

15. *See* Laura Eggertson et al., *Copps Sets Stage for War Over Culture*, GLOBE AND MAIL, Feb. 11, 1997, at A1.

16. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R. 725 (Can.).

17. *Id.* at 757, ¶ 43.

and Mexico. Part IV outlines the constitutional structure of Canada and its system of courts. Part IV also examines the constitutional limits on the ability of the Canadian Parliament to take power away from the superior courts and give it to other adjudicative bodies. Part V discusses the application of the constitutional limits on the delegation of decision-making power to the NAFTA binational tribunals. Part VI concludes that unless Canada addresses the implications of international free trade agreements as they relate to traditional notions of sovereignty and adjudication, it will not be able to reap the full benefits of the emerging global market.

II. THE NAFTA DISPUTE RESOLUTION PROCESS: CHAPTER 19

A. Canada's Non-NAFTA Antidumping Procedures

Chapter 19 of NAFTA creates a procedure for settling disputes involving antidumping and countervailing duties between NAFTA countries. In order to understand the significance of this change to Canadian law and procedure, it is important to examine the procedures used in Canada for disputes with non-NAFTA parties and compare them with the regime created by Chapter 19.

1. Dumping and Antidumping

Goods may be considered "dumped" when the price that exporters charge to their foreign consumers is less than the normal value of the goods or the price charged to customers in their domestic market.[18] Dumping exporters often subsidize these low export prices with high prices in the home market where the producer may have a monopoly. In this respect, dumping can be seen as the international equivalent of predatory pricing. Antidumping laws seek to prevent exporters from selling their products at unfairly low prices in other countries. In Canada, the offense of dumping contains two elements: (1) an export to Canada priced at less than its fair value that (2) results in injury or threat thereof to a Canadian industry.[19] The penalty that can be imposed in response to such practices is an "antidumping duty," a tariff placed on the good designed to restore the export price to its fair value.[20]

2. Subsidies and Countervailing Duties

Subsidies are financial contributions made by governments to local

18. *See* Special Import Measures Act, R.S.C., ch. S-15, § 2(1) (1985) (Can.).
19. Special Import Measures Act, R.S.C., ch. S-15, § 5 (1985) (Can.).
20. *Id.* § 3(1).

producers.[21] Companies that receive subsidies can sell their goods in foreign markets at prices lower than competing firms that do not receive government assistance. A countervailing duty seeks to prevent the importation of subsidized goods into Canada at prices that are unfairly low. A successful countervailing duty action requires: (1) a subsidy given by the exporter's government; and (2) a resulting injury to a Canadian industry.[22] The penalty is a "countervailing duty," a tariff intended to offset the government subsidy.[23]

The following discussion on the procedures for antidumping duties applies equally for countervailing duties. However, for the sake of brevity and to avoid repetition, only antidumping duties will be discussed.

3. Procedures for Imposing Antidumping Duties in Canada

The legislation regarding antidumping is set out in the Canadian Special Import Measures Act (SIMA)[24] and the Canadian International Trade Tribunal Act (CITTA).[25] Under these Acts, in order to impose an antidumping duty, there must be a finding of dumping and serious injury.[26] The institutional responsibilities for determining these issues are separated, with "dumping" determinations being made by the Deputy Minister of National Revenue (DMNR),[27] and "serious injury" determinations being made by the Canadian International Trade Tribunal (CITT).[28] Antidumping complaints can be initiated by the industry allegedly affected by the dumped good, which is usually a local competitor.[29]

If there is evidence of dumping, the DMNR makes a provisional determination of the dumping margin and imposes provisional antidumping duties equal to the margin of dumping on the imports.[30] The CITT then undertakes a thorough injury inquiry.[31] If the CITT makes a finding of material injury, anti-dumping duties are imposed which reflect the DMNR's final margin of dumping determination.[32] If the CITT does not find material injury, the investigation is terminated and any provisional duties paid are refunded.[33]

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21. *Id.* § 2(1).
22. *Id.* § 6.
23. *Id.* § 3(1).
24. Special Import Measures Act, R.S.C., ch. S-15 (1985) (Can.).
25. Canadian International Trade Tribunal Act, R.S.C., ch.47 (4th Supp.) (1985) (Can).
26. *Id.* § 26(4). *See also* Special Import Measures Act § 5.
27. Special Import Measures Act §§ 38-41.
28. Canadian International Trade Tribunal Act § 20.
29. *Id.* §§ 22-30.
30. Special Import Measures Act § 38(1).
31. Canadian International Trade Tribunal Act §§ 22-30.
32. Special Import Measures Act § 41.
33. *Id.* § 43.

While the CITT's decision is "final and conclusive," the CITT may review its own findings if it is satisfied that such a review is warranted.[34] For disputes between parties from Canada and a non-NAFTA country, there are also appeals to the Federal Court of Appeal and then to the Supreme Court of Canada on questions of law.[35]

B. Changes to the Canadian Procedures Under NAFTA

Under NAFTA, the substantive domestic antidumping and countervailing duty laws and procedures of the NAFTA countries are preserved,[36] but two new institutions have been created. The first entity is the Binational Panel that reviews final antidumping and countervailing duty determinations by domestic agencies.[37] The second entity is the Extraordinary Challenge Committee that reviews Binational Panel decisions.[38] The effect of these two tribunals is to replace judicial review by national courts with Binational Panel review for antidumping and countervailing duty determinations.[39] The SIMA and the CITTA have been amended to reflect the changes required by NAFTA obligations.

1. Policy reasons behind NAFTA Chapter 19

In the negotiations under the Canada-U.S. Free Trade Agreement,[40] and later under NAFTA, Canadian trade representatives were eager to take the final decision-making authority over antidumping and countervailing duties away from the courts of the United States. They believed that Canadian firms were subject to unfair treatment at the hands of American judges influenced by their national politics.[41] The Canadians sought to eliminate the American antidumping and countervailing duty laws as they applied to Canada and replace them with a new set of laws to be interpreted and enforced by a binational tribunal.[42] When the Americans rejected any changes to U.S. law, the compromise reached was the creation of the Binational Panels and the Extraordinary Challenge Committees discussed in detail below.

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34. *Id.* § 76.

35. Federal Court Act, R.S.C., ch. F-7, § 28 (1985) (Can.).

36. *See* NAFTA, *supra* note 4, at art. 1902.1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other party.

37. *Id.* art. 1904(1).

38. *Id.* art. 1904(13). *See also id.* annex 1904.13.

39. *Id.* art. 1904(1).

40. Canada-United States Free-Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force on Jan. 1, 1989).

41. *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 145 (1994).

42. *See* Gregory W. Carman, *Resolution of Trade Disputes By Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality*, 21 FORDHAM INT'L L.J. 1, 2 (1997).

2. Binational Panels

Once the CITT issues a final determination, an "involved party" from a NAFTA country has 30 days to request a review by a NAFTA Panel.[43] The term "involved party" is defined as the importing party or the party whose goods are the subject of the final determination.[44] Upon a request for Binational Panel review, that process begins and the traditional path of judicial review is unavailable. The Panel first obtains the administrative record from CITT. A representative of that agency can appear before the Panel.[45] Interested parties with standing to appear in a traditional appeal can submit briefs and present oral arguments.[46] Based on this evidence, the Panel assesses the agency's determination to see if it complied with the substantive law of the country.[47] The Panel then decides whether to uphold the agency's decision or remand the proceeding for action not inconsistent with the Panel's decision.[48] A written opinion with reasons for the decision is provided along with dissenting opinions. The standard of review, and the legal principles to be applied by the Panel are those that a court of the defendant party would use.[49] The decision is binding with respect to the parties and the particular matter before the Panel.[50] In the event of an adverse finding, a defendant state is required to change its laws to conform to the Panel's determination of the requirements of NAFTA.[51] Article 1904(11) states that:

> A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.[52]

The purpose of this section is to avoid Panel decisions that contradict rulings by federal courts with respect to the same final determinations. By way of example, suppose an American producer is exporting to Canada and is accused of dumping. If the CITT rules against her, an antidumping duty is levied against her products. She may then request a Binational Panel review. In this case, all Canadian importers bound to pay the antidumping duty would have to appear before the Binational Panel and would thereby be unable to go before the Canadian

43. NAFTA, *supra* note 4, art. 1904(4).
44. *Id.* art. 1911
45. *Id.* art. 1904(7).
46. *Id.* art. 1904(14).
47. *Id.* art. 1904(8).
48. *Id.*
49. NAFTA, *supra* note 4, art. 1904(3).
50. *Id.* art. 1904(11).
51. *Id.* art. 1904(15).
52. *Id.* art. 1904(11).

courts to challenge the ruling.

Now suppose that the Binational Panel decides in favor of the American exporter and her Canadian competitors believe that the Panel exceeded its jurisdiction or applied the wrong standard of judicial review. In such an instance, there would be no recourse to the Canadian courts. As is often the case with international adjudication, the Panel's decisions are made by *ad hoc* judges who are appointed from a roster for a particular case.[53] There are no permanent clerks or research assistants.[54] So unlike an appellate court, the Binational Panels have no institutional longevity, increasing the likelihood of poor reasoning or inconsistent decisions.

Each of the three NAFTA countries is to select at least 25 candidates for membership on Binational Panels.[55] The Agreement expresses a preference for sitting or retired judges as panelists.[56] Each Panel is to consist of five members; two selected by each country involved in the dispute and the final panelists selected by agreement between the two countries.[57] If no agreement can be reached as to the final panelist, the countries are to decide by lot which of them will select the fifth panelist, excluding candidates eliminated by peremptory challenges.[58]

Additionally, the Binational Panels serve one function other than judicial review. Under Article 1903, a NAFTA country may request that an amendment to another Party's antidumping or countervailing duty laws be referred to a Panel for a declaratory opinion on whether the amendment is consistent with the GATT and NAFTA.[59]

3. The Extraordinary Challenge Committee ("ECC")

NAFTA allows a limited right of appeal to the ECC that reviews certain Panel decisions.[60] However, appeals are only permitted when: (1) there has been gross misconduct, bias, serious conflict of interest, or other material misconduct on the part of a panelist; (2) there has been a serious departure from a fundamental rule of procedure; or (3) a Panel manifestly exceeds its powers, authority or jurisdiction, for example, by failing to apply the appropriate standard of judicial review.[61] It must also be established that the action materially affected the Panel's decision, and that the decision threatens the integrity of the Binational

53. NAFTA *supra* note 4, annex 1901.2.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. NAFTA, *supra* note 4, art. 1903.
60. *Id.* art. 1904(13).
61. *Id.* art. 1904(13)(a).

Panel review process.[62]

Each NAFTA country selects five sitting or retired judges as potential ECC members.[63] From this roster, the two opposing countries in a dispute pick a committee of three.[64] After each country selects one member, the two countries draw lots to determine which side gets to choose the third member.[65] The ECC either affirms the Panel decision or vacates it for remand to a new Panel.[66] The ECC's rulings are binding with respect to the matter and the parties involved.[67] As is the case for the Binational Panels, Chapter 19 of NAFTA expressly prohibits any Party to the Agreement from establishing legislatively a procedure to challenge ECC determinations in their respective court systems.[68]

III. THE CONSTITUTIONAL PROBLEM POSED BY CHAPTER 19

A. United States

Several articles have been written as to whether Chapter 19 of NAFTA violates Article III of the U.S. Constitution, with no consensus having been reached as to the correct answer.[69] The principal issue is whether NAFTA Binational Panels are without authority to review decisions of the United States' Department of Commerce and the United States' International Trade Commission by virtue of Article III Section 1 of the United States Constitution. That Section reads: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[70]

By entering NAFTA, Congress and the President may have exceeded the authority granted to them respectively by Articles I and II of the Constitution, having unlawfully ceded powers encompassed within the sovereignty of the United States to an international tribunal.

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62. *Id.* art. 1904(13)(b).
63. NAFTA, *supra* note 4, annex 1904.13.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* art. 1904(11).
69. For example, Demetrios Metropoulos concludes that Chapter 19 of NAFTA does violate Article III of the United States' Constitution. *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L. L.J. 141 (1994). Denis J. Edwards reaches the opposite conclusion. Denis J. Edwards, *NAFTA and Article III: Making a Drama Out of a Crisis*, NAFTA: LAW & BUS. REV. AMS., vol. I, No. 2, 69 (1995). For other articles on this topic, see *supra* note 7.
70. U.S. CONST. art. 3, § 1.

B. *Mexico*

Article 13 of the Mexican Constitution states that, "[n]o one shall be judged based on special laws or statutes."[71] The second paragraph of Article 17 provides that, "[a]ll persons have a right to the administration of justice by expedite courts that shall administrate justice in the time and terms established by law and the decisions of such courts shall be issued in a prompt, complete and impartial manner."[72] It has been suggested that by removing judicial review from the Mexican courts, Article 1904(11) of NAFTA is inconsistent with the above-mentioned sections of the Mexican Constitution.[73]

C. *Canada*

The same type of contention could be raised in Canada. A strong argument can be made that Chapter 19 of NAFTA takes away the power of judicial review of administrative tribunals from the Canadian superior courts in violation of Section 96 of the Canadian Constitution. What follows is a detailed description and evaluation of this argument.

IV. LIMITS ON THE DELEGATION OF JUDICIAL POWERS

Before addressing the constitutionality of NAFTA Chapter 19 Binational Panels, it will be helpful to review Canada's constitutional and judicial structures. This will assist in illustrating the limitations the Canadian constitution places on Parliament's ability to relocate decision-making powers from the superior courts to administrative tribunals.

A. *Constitutional Structure of Canada*

The Constitution of Canada is composed of written documents and constitutional customs.[74] The written documents consist of what was formerly known as the British North America Act of 1867 (the BNA Act) [75] and the more recently adopted Canadian Charter of Rights and Freedoms (the Charter).[76]

The BNA Act is the imperial statute that triggered the confederation of the British Colonies that became Canada. It divides legislative power in the Canadian federal system between the Federal Parliament

71. CONSTITUTION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 13 (Mex.).

72. *Id.* art.17.

73. *See* Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies,* 3 SW. J. L. & TRADE AM. 431, 434 (1996).

74. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, ch. 1 (3d ed. 1992).

75. British North America Act, 30 & 31 Vict., ch. 3 (U.K.) (now referred to as the Constitution Act, 1867).

76. Schedule B Canada Act, 1982, ch. 11 (U.K.).

and the Provincial Legislatures.[77] Section 92 of the BNA Act sets out the enumerated classes of subjects over which the provinces have exclusive legislative competence and Section 91 outlines the areas in which the federal Parliament has exclusive jurisdiction.[78] In 1982 two developments occurred. First, the BNA Act was renamed the Constitution Act 1867. Second, the Charter came into effect and entrenched a number of rights and freedoms and gave Canadian courts the responsibility to enforce them.[79]

B. Courts

One of the principal foundations upon which the Canadian Constitution rests is its unified national judiciary, the result of a compromise between federal and provincial powers made by the Fathers of Confederation in 1867. While the provinces were given responsibility for the administration of justice under Section 92(14) of the constitution,[80] under Section 96, the Governor General was given the power to appoint judges to the superior, district and county courts in each province.[81] Section 100 obliges the Parliament of Canada to fix and pay the salaries of these judges.[82] The possible overlap of federal and provincial constitutional power with respect to the courts has led to cooperation between the levels of government in maintaining a strong unified judicial presence throughout Canada.

1. Nature of the Superior Courts

The Canadian Constitution applies a British parliamentary model for government to a federated state. At the time of Confederation in 1867, each of the uniting provinces' own courts were modeled on the English system.[83] The superior courts had jurisdiction throughout the province.[84] Upon the creation of Canada, it was decided that the courts already existing in the provinces would continue to operate.[85] This gave rise to the general jurisdiction trial courts that are now the superior courts in the provinces.[86] As direct descendants of the English superior courts, the Canadian provincial superior courts (often referred to as the Section 96 courts), possess "inherent jurisdiction," which means they

77. Constitution Act, 1867, R.S.C., App. No. 5, §§ 91-92 (1985) (Can.). *See also* ALBERT ABEL, LASKIN'S CANADIAN CONSTITUTIONAL LAW ch. 1 (4th ed. 1973).
78. Constitution Act, 1867 §§ 91-92.
79. Constitution Act, 1982, R.S.C., App. No. 44, § 53(2) (1985) (Can.).
80. Constitution Act, 1867 § 92(14).
81. *Id.* § 96.
82. *Id.* § 100.
83. T.A. Cromwell, *Aspects of Constitutional Judicial Review in Canada*, 46 S.C.L. REV. 1027, 1029 (1995).
84. PETER W. HOGG, *supra* note 74, at 162.
85. *Id.*
86. *Id.*

have original jurisdiction in any matter unless it is clearly taken away by statute.[87]

As discussed in the next section, the Supreme Court of Canada has recently held in *MacMillan* that the Section 96 courts possess a constitutionally guaranteed core of jurisdiction that cannot be removed by either provincial or federal legislation.[88] The Court also held that neither the federal nor the provincial government could confer on an inferior court or tribunal the powers of a superior court.[89] It is these two limitations on the delegation of adjudicative power that question the constitutional validity of Chapter 19 of NAFTA in Canada.

Because the Section 96 courts have general jurisdiction, there is no need for separate federal courts to decide "federal" issues.[90] This gives rise to a largely unitary court system operating within the federal state. In Canada, the jurisdiction of a court does not depend on whether the law to be applied emanates from the federal or the provincial governments. As a result, while contract law is within the provincial sphere of jurisdiction, contract cases are presided over by federally appointed judges in the provincial superior courts. The courts are creatures of provincial legislation, with facilities and staff provided and paid for by the provinces.[91] Appeals from the superior courts go to provincial courts of appeal and can then be appealed to the Supreme Court of Canada.[92]

Section 101 of the Constitution of Canada permits Parliament to create "a General Court of Appeal for Canada" and "any additional Courts for the better Administration of the Laws of Canada."[93] The Supreme Court of Canada and the Federal Court were created by the federal Government pursuant to Section 101. The Canadian Supreme Court is a general court of appeal for Canada, having jurisdiction over all laws within the legislative competence of both the federal or the provincial legislatures.[94] Appeals lie from all courts to the Supreme Court of Canada, which thereby exercises a unifying influence.[95]

The Federal Court has a trial and an appellate division.[96] Its jurisdiction is limited to administrative judicial review of federal tribunals, certain areas of federal law such as copyright and admiralty, and actions involving the federal Crown.[97] The Federal Court does not have "ancillary" jurisdiction, and its jurisdiction is largely concurrent with

87. T.A. Cromwell, *Aspects of Constitutional Judicial Review in Canada*, *supra* note 83, at 1031.
88. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R.725, 740, ¶ 15 (Can.).
89. *Id.*
90. T.A. Cromwell, *supra* note 83, at 1030.
91. *Id.*
92. PETER W. HOGG, *supra* note 74, at 162-166.
93. Constitution Act, 1867, R.S.C., App. No. 5, § 101 (1985) (Can.).
94. T.A. Cromwell, *supra* note 83, at 1029.
95. *Id.*
96. Federal Court Act, R.S.C., ch. F-7, § 4 (1985) (Can.).
97. *Id.* §§ 16, 18, 20, 22, 28.

the provincial superior courts.[98]

2. Delegation of Judicial Powers

As Canadian society has grown more complex, the number of disputes involving Canadians has increased dramatically. To cope with the greater demand for the judicial settlement of disputes, Parliament and the legislatures have created many specialised tribunals to supplement the work of the Section 96 courts.[99] Each new social structure created has given rise to new conflicts, which the government has addressed through regulation. This in turn has often resulted in the creation of new administrative tribunals.[100] Several factors can explain the preference of Parliament and the legislatures for administrative tribunals with decision-making powers: the desire for a specialist body; the need for a comprehensive investigative, adjudicative and policy-formation approach to certain problems; and lack of another way to address the sheer volume of disputes which arise in certain sectors.

Little attention was paid to Sections 96 through 101,[101] the "judica-

98. Quebec N. Shore Paper Co. v. Canadian Pac., Ltd., (1977) 2 S.C.R. 1054, 1065-66 (Can.).

99. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R at 761, ¶ 53.

100. *Id.*

101. Sections 96 to 101 of the Constitution Act, 1867 provide:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.).

ture sections" of the Constitution at the time of Confederation.[102] However, since the 1930s, the Privy Council and the Supreme Court of Canada have attached considerable significance to these Sections, extending the scope of their application beyond the mere appointment of judges.[103]

The conferral of judicial functions on bodies that are not superior courts is not expressly prohibited by the judicature sections of the Constitution. However, the Supreme Court of Canada has interpreted Sections 96 to 100 as a limit on the power of the provincial legislatures to delegate decision-making power.[104] The Court has held that the provincial legislatures may not confer on a body other than a superior court, judicial functions analogous to those performed by a superior court.[105] A tribunal that is given such functions is illegally constituted unless it meets the requirements of Sections 96 to 100 (*i.e.* members must be appointed by the federal Government, drawn from the bar of the appropriate provinces and receive salaries that are fixed and provided for by the federal Government).[106] Recently it has been made clear that the same restrictions apply to the federal Parliament at least to the extent that it cannot take certain "core" functions away from the superior courts and give them to inferior courts or administrative tribunals.[107]

It should be noted that as the courts of inherent jurisdiction, Canadian superior courts seem to have no limits to their jurisdiction. Therefore, they can be given novel jurisdiction or they can adjudicate disputes that were traditionally heard by inferior courts.[108]

3. History of the Section 96 Cases up until *MacMillan*

Initially, Canadian courts refused to accept that Parliament or the legislatures could transfer any adjudicative powers of the superior courts to inferior courts or tribunals.[109] However, as modern society led to a proliferation of economic relationships that required regulation by specialised administrative agencies, the courts gradually relaxed their grip on adjudication.[110] In order to preserve the constitutional role of the Section 96 courts, Canadian judges developed a test that sought to

102. *See* REESOR, *supra* note 50, at 251.

103. *See* discussion of cases *infra* pp. 114-16.

104. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 7.3(a) (3rd ed. 1992).

105. *See* Reference re Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186. (Can.); Sobeys Stores Ltd. v. Yeomans [1989] 1 S.C.R. 238 (Can.); Attorney Gen. of Que. v. Grondin [1983] 2 S.C.R. 364 (Can.); Re Residential Tenancies Act [1981] 1 S.C.R. 714 (Can.).

106. Constitution Act, 1867, R.S.C., App. No. 5, §§ 96-100 (1985) (Can.).

107. *See* the majority decision *in* MacMillan Bloedel v. Simpson [1995] 4 S.C.R. 725, discussed *infra* notes 75-81 and accompanying text.

108. *See* HOGG, *supra* note 56, at 7.3(d).

109. MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 55.

110. MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 57.

balance the need to maintain a strong constitutional position of Section 96 courts with the need to provide sufficient scope for the creation of effective administrative tribunals.[111]

The "no-delegation" position was entrenched law in Canada as late as 1938, when the Judicial Committee of the Privy Council held that the Ontario legislature could not confer any judicial powers on the Ontario Municipal Board by virtue of Section 96 of the Constitution.[112] But that doctrine proved to be unworkable. In *Reference re Adoption Act,*[113] the Supreme Court rejected the "no-delegation" approach and held that increases in the jurisdiction of inferior tribunals were permitted so long as their new power broadly conformed to the jurisdiction exercised by inferior courts.[114] In light of the need for more adjudicators, the legislatures and the courts continued to expand the provinces' power of judicial delegation. In 1949, the Privy Council held that as long as a judicial power had not been one that was traditionally exercised by the Section 96 courts, the legislatures could delegate it to an inferior tribunal.[115]

The next major development in this doctrine occurred in 1977 when the Supreme Court of Canada decided *Tomko v. Labour Relations Board (Nova Scotia).*[116] In *Tomko*, the Nova Scotia Labour Relations Board issued a 'cease and desist' order.[117] That order was challenged under Section 96 because it was analogous to a mandatory injunction, which was within the traditional jurisdiction of the superior courts.[118] The Supreme Court ruled that, in determining whether a delegation of judicial power violated Section 96, the transferred power must be considered in the context of the tribunal's object and purpose.[119]

The test from *Tomko* was refined by the Supreme Court of Canada in 1980 in the decision of *Re Residential Tenancies Act, 1979.*[120] The Justices in *Residential Tenancies* held that courts must examine the institutional setting of a tribunal in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body. The Court wrote:

> An administrative tribunal may be clothed with power formerly exercised by Section 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the func-

111. *See* Madam Justice McLachlin *in* MacMillan, *supra* note 58.
112. *See* Toronto v. York [1938] 1 D.L.R. 593 (Can.).
113. Reference re Adoption Act, 1938 S.C.R. 398 (Can.).
114. *Id.* at 421.
115. *See* Labour Relations Bd. of Sask. v. John East Iron Works, Ltd. [1949] 3 D.L.R. 488 (Can.).
116. *See* Tomko v. Labour Relations Bd. (N.S.) [1977] 1 S.C.R. 112 (Can.).
117. *Id.*
118. *Id.* at 113.
119. *Id.* at 120.
120. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714 (Can.).

> tion of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is *ultra vires*.[121]

Under this approach, an administrative scheme is only invalid when adjudication is the sole or central function of the tribunal, such that the tribunal can be said to be operating like a Section 96 court.[122]

Justice Dickson laid down a three-step approach to determining whether a transfer of power from a Section 96 court to an inferior court was constitutional.[123] The first step is to determine if the power given to the inferior tribunal historically fell within the jurisdiction of the Section 96 courts.[124] The second step is to determine whether the power is judicial.[125] If the power is judicial and was exercised exclusively[126] by the superior courts at the time of confederation, the inquiry moves to the third step, the consideration of the institutional setting in which the judicial power is employed.[127] If the exercise of power is subsidiary or ancillary to what is predominantly an administrative function, or is incidental to the achievement of a broader policy goal of the legislature, the transfer of Section 96 judicial power is nonetheless valid.[128] If, however, the superior court power conferred on the tribunal is a dominant part of its function, the tribunal will be seen as acting like a Section 96 court and will be found to be unconstitutional.[129]

While the above Section 96 case law clearly binds provincial legislatures, the applicability of this analysis to the federal Parliament was an undecided issue in Canada for some time.[130] In 1992, in the case of *Chrysler Canada v. Canada (Competition Tribunal),*[131] the majority of the Supreme Court of Canada decided not to rule on whether Section 96 limited the powers of Parliament.[132] However, this issue now seems to have been resolved with *MacMillan* and the decisions that have

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121. *Id.* at 733-34.

122. *Id.* at 736.

123. *Id.* at 734-35.

124. In Sobeys Stores Ltd. v. Yeomans [1989] 1 S.C.R. 238 (Can.), Madam Justice Wilson suggested that the issue was not the remedies exercised by the superior courts at the time of Confederation, but whether the dispute was one which fell within their jurisdiction.

125. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714, 734 (Can..).

126. The requirement that the imputed power had to have been exercised exclusively by the superior courts at the time of confederation in order to be unconstitutional was laid down by the Supreme Court in *Attorney General of Que. v. Grondin*, [1983] 2 S.C.R. 364 (Can.).

127. Addy v. Queen [1985], 22 D.L.R. (4th) 52 (Can.).

128. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. at 735-36.

129. *Id.*

130. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 7.2 (3d ed. 1992).

131. Chrysler of Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 S.C.R. 394 (Can.).

132. *Id.* at 443-44.

adopted it.[133]

C. *MacMillan Bloedel v. Simpson*

In *MacMillan*, the defendant Simpson was a minor who was 17 years of age at the time of his arrest.[134] Simpson violated an injunction issued by the British Columbia Supreme Court prohibiting certain protests.[135] As a result, Simpson was charged with contempt of court.[136] At trial, Simpson made an application to be tried in youth court pursuant to Section 47(2) of the Young Offenders Act, an Act of the Parliament of Canada, which transfers jurisdiction over contempt of court committed by a minor to the youth court.[137] That section reads:

> 47. . . (2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.[138]

The application was dismissed and Simpson was convicted.[139] Simpson appealed on the ground that the British Columbia Supreme Court had no jurisdiction to try him.[140] The Court of Appeal upheld the conviction holding that 47(2) of the Young Offenders Act was unconstitutional.[141] It reasoned that because the contempt power is within the core jurisdiction of the superior courts, it is beyond the competence of Parliament to remove any part of the contempt powers from those courts.[142] In a five-four decision, the Supreme Court upheld the ruling of the Court of Appeal.

On the basis of the *Residential Tenancies* test, the Supreme Court held that the grant of jurisdiction to youth courts was permissible. First, on the historical test, the contempt of court charge was clearly within Section 96 jurisdiction at the time of Confederation.[143] Second, jurisdiction of the youth court was unquestionably to be exercised judi-

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133. In Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1994] 3 S.C.R. 3 at 68 the majority of the Supreme Court affirmed that section 96 did apply to tribunals created by Parliament as did the majority of the Supreme Court in Reference re Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186 ¶ 73.

134. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R. at 734, ¶ 4.

135. *Id.*

136. *Id.*

137. *Id.* ¶ 5.

138. Young Offenders Act, R.S.C., ch. Y-1, § 47(2) (1985) (Can.).

139. MacMillan Bloedel at 734, ¶ 5.

140. *Id.* at 736, ¶ 8.

141. *Id.*

142. *Id.*

143. MacMillan Bloedel at 747, ¶ 26.

cially.[144] However on the third test, the institutional setting test, the grant of jurisdiction was found to be constitutional.[145] The Court concluded that the institutional setting of the transfer of power was the youth courts, which were part of a novel approach to curbing criminal conduct.[146] These courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The Court held that the power to punish youths' contempt of superior courts was merely ancillary to those primary functions.[147] Accordingly, granting jurisdiction to punish youths for contempt of superior courts did not infringe upon Section 96 of the Constitution Act, 1867.[148] On that issue, the entire Court agreed. The real issue in the case was whether the delegation of contempt power over youths to an inferior court could be *exclusive*, such that superior court jurisdiction was completely removed.[149] On this issue the court split five judges to four.

Chief Justice Lamer wrote the majority decision that made two dramatic changes to the law regarding Section 96. First, the majority decision made clear for the first time that Section 96 limits the powers of both Parliament and the provincial legislatures, since the case involved a delegation of judicial power by Parliament. The dissent did not take any objection with this innovation and subsequent cases have affirmed this principle.[150] Second, the majority held that under Section 96, jurisdiction to decide certain matters could never be taken away from the superior courts, and that contempt of court was part of that "core" jurisdiction.[151] Chief Justice Lamer wrote:

> The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.[152]

Lamer did not attempt to provide a finite list of the "core functions"

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See* Reference re Remuneration of Judges of the Provincial Court (P.E.I.) 68; Reference re Residential Tenancies Act (N.S. 1992), ¶ 73.
151. MacMillan at 740, ¶ 15.
152. *Id.*

of the Section 96 courts. Instead, he quoted Keith Mason with approval to the effect that the "ubiquitous nature" of inherent jurisdiction "precludes any exhaustive enumeration of the powers which are thus exercised by the courts."[153] Chief Justice Lamer was of the opinion that inherent jurisdiction is that which is integral to the operations of the superior courts.[154] For such jurisdiction, no part of it could be removed by either level of government in the absence of a constitutional amendment.[155] The majority was of the opinion that adjudicating contempt of court proceedings was part of the "core functions" of the Section 96 courts.[156] Therefore, Section 47(2) was valid to the extent that it conferred jurisdiction on the youth court but was inoperative in depriving the superior court of its jurisdiction to convict the appellant of contempt.[157]

Lamer quoted from I. H. Jacob's "The Inherent Jurisdiction of the Court" and concluded:

> While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.[158]

Madam Justice McLachlin wrote for the four dissenting judges. The dissenting opinion viewed the *Residential Tenancies* test as sufficient for preserving the functions of administrative tribunals without violating the constitution. Justice McLachlin rejected as unnecessary the additional condition that the transfer of judicial power to inferior tribunals not involve any aspect of the "core" powers of the superior courts.[159] The dissenters wrote that the proposed "core test" needlessly derogated from the functional approach of the *Residential Tenancies* test.[160]

153. Keith Mason, *The Inherent Jurisdiction of the Court*, 57 AUSTL. L.J. 449, 449 (1983), as quoted by Justice Lamer in MacMillan, *supra* note 75, ¶ 33.

154. MacMillan, 4 S.C.R. at 754, ¶ 38.

155. *Id.* at 757, ¶ 42.

156. *Id.* at 754, ¶ 38.

157. *Id.* at 757, ¶ 43.

158. *Id.* ¶ 30, Justice Lamer *quoting* Isaac H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 27 (1970).

159. MacMillan 4 S.C.R. at 780, ¶ 93

160. *Id.* at 779, ¶ 91.

V. APPLICATION OF SECTION 96 JURISPRUDENCE TO THE NAFTA PANELS

A. Constitutionality of Chapter 19 Panels

1. Does Section 96 Jurisprudence Apply to the Federal and Supreme Courts?

A threshold question concerns the applicability of cases like *MacMillan* to the federal courts. An argument can be made that the cases discussed above address the unconstitutional creation of provincial superior courts or the removal of power from provincial superior courts. Since NAFTA Binational Panels remove the power of judicial review from the Federal Court and the Supreme Court of Canada, and not the provincial superior courts, there is no constitutional difficulty, at least not as defined above. This argument is not completely without merit. There has been some debate in Canada as to whether the Federal Court and the Supreme Court of Canada, as creations of federal statute, are "superior courts" such that the limitations of Sections 96-100 of the Constitution apply to them.

The issue was first raised in an article by W.R. Lederman,[161] where he argues that the term "superior court" in Section 96 of the Constitution applies to the federal superior courts created under Section 101.[162] According to Lederman, the Federal and Supreme Court are subject to the same constitutional limitations regarding delegation of decision-making authority as are the provincial superior courts:

> [I]ndeed the General Court of Appeal for Canada would necessarily and pre-eminently be a superior court on the English model. To consider that Section 101 could mean anything else would be so incongruous as to be absurd.
>
> Surely the B.N.A. Act necessarily implies that the "General Court of Appeal for Canada" must be a superior court in the fullest sense, and it is guaranteed typical and appropriate superior court appellate jurisdiction.
>
> When one realizes that the guaranteed jurisdiction of the provincial superior courts rests upon a wider basis of necessary implication than the "mere" federal appointing power in section 96, as explained earlier, then it follows that the same wider basis of implication is equally relevant to the federal superior courts and should confer on them a similarly guaranteed jurisdic-

161. William. R. Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 1139, 1176 (1956).

162. *Id.* at 1175-77.

tion.[163]

This view was rejected by Justice Laskin as follows: "It has been suggested by Lederman that the limitations of ss. 96 to 100 of the B.N.A. Act may properly be imported into Section 101 so as to restrict federal courts in the same way, but there is no tenable ground of history or text to support the suggestion."[164]

Under the Lederman approach, Parliament can take "core" jurisdiction away from the provincial superior courts and give it to the federal superior courts, but it cannot take it away from all superior courts and give it to an inferior tribunal.[165]

This issue seems to have been resolved in favor of the Lederman approach in the case of *Addy v. The Queen.*[166] In *Addy*, the plaintiff was a judge of the Federal Court who was 69 years of age.[167] The Federal Court Act provided that judges of the Federal Court must cease to hold office upon attaining the age of seventy years.[168] Section 99(2) of the Constitution provided that judges of the superior courts could hold office until they reached the age of 75.[169] Addy argued that the mandatory retirement provision of the Federal Court Act was inconsistent with Section 99(2) of the Constitution and therefore was of no force and effect.[170] The Federal Court agreed, holding that the Supreme Court of Canada and the Federal Court of Canada were superior courts within the meaning of Section 99(2). The Court quoted from Blackstone's Commentaries:

> A superior court as distinguished from an inferior court possess broad supervisory jurisdiction over inferior tribunals and keeps them within the bounds of their authority by removing their proceedings to be determined in such superior court or by prohibiting their progress in the inferior tribunal.[171]

If the federal courts are "superior" for the purposes of Section 99, they must also be "superior" for the purposes of Section 96, as Sections

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163. *Id.*

164. *See* BORA LASKIN, CANADIAN CONSTITUTIONAL LAW 76 (4th ed. rev. 1975).

165. Justice Lamer in *MacMillan* seems to reject the notion that inherent powers could always be transferred between superior courts. At paragraph 42 of that decision he wrote: The full panoply of contempt powers is so vital to the superior court that even removing the jurisdiction in question here and transferring it to another court with judges appointed pursuant to s. 96 would offend our Constitution." *See* MacMillan Bloedel, ¶ 42.

166. Addy v. Queen [1985], 22 D.L.R. (4th) 52 (Can.). The federal Government did not appeal the decision, and section 8 of the Federal Court Act was amended to raise the age of retirement for federal court judges to 75 years. S.C. 1987, ch.21, §7.

167. Addy v. Queen [1985] 22 D.L.R. at 53.

168. The Federal Court Act R.S.C. ch. 10 (2d Supp.) § 8(2) (1970) (Can.).

169. Constitution Act, 1867, R.S.C., App. No. 5, § 99(2) (1985) (Can.).

170. Addy v. Queen [1985], 22 D.L.R. at 55.

171. 3 BLACKSTONE'S COMMENTARIES 43-46 (1768), *cited in* Addy, 22 D.L.R. at 58.

96 to 100 have consistently been read together to form the "judicature sections" of the Canadian Constitution. As a result, the constitutional restrictions of Section 96 apply equally to the federal and provincial superior courts.

Having established that Section 96 applies to Chapter 19 of NAFTA, two similar but distinct questions must be addressed. The first is whether it is a violation of Section 96 of the Canadian Constitution to give the Binational Panels the power of judicial review in antidumping cases. The second is whether taking the power of judicial review away from the Federal Court violates Section 96. Each of these will be addressed in turn.

2. Is the Grant of Jurisdiction to the Binational Panel Unconstitutional?

According to recent Canadian case law on Section 96, before applying the *Residential Tenancies* test, the essential nature of the inferior tribunal and the power being delegated must be determined. Only after the court has properly categorized the pith and substance of the legislation, can it proceed with the three-part test laid down in *Residential Tenancies*.

a. Characterization of the Law

The implementing legislation for Chapter 19 of NAFTA creates a Binational Panel that reviews antidumping decisions of federal tribunals. This can only be characterized as judicial review. The scheme created may be considered judicial review in the broad sense or, alternatively, could be characterized more specifically as judicial review of antidumping and countervailing decisions. In either case, the primary nature of the issue in question revolves around the question of the limits on Parliament's ability to delegate judicial review power.

b. Historical Inquiry Test

The Historical Inquiry Test is the first part of the inquiry laid down in *Residential Tenancies*. It asks whether the subject matter at issue is one which is "broadly conformable" to the exclusive jurisdiction exercised by section 96 at the time of Confederation.[172] There can be no doubt that this is true of judicial review. But that does not end the historical inquiry. In *Reference re Young Offenders Act*, Chief Justice Lamer added a qualification to the "historical inquiry" test.[173] Justice Lamer suggested that the legislative purpose of the grant of power, and

172. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714, 734 (Can.).
173. Reference re Young Offenders Act (P.E.I.), [1991] 1 S.C.R. 252, 269 (Can.).

the nature of the scheme in question, should be considered.[174] If what appeared to be a power that was traditionally exercised by the superior courts, forms part of a new legal regime, it will not violate Section 96. Applying this approach to *Reference re Young Offenders Act*, Justice Lamer concluded that the powers granted to youth courts, and the administrative scheme set up under the Young Offenders Act, could be viewed as having created "new powers or jurisdiction." Such jurisdiction was not within the power of the superior courts at the time of Confederation and therefore the transfer of power was held valid.[175]

Using this analysis it could be argued that Chapter 19 of NAFTA also forms part of a novel jurisdiction, as there was no antidumping or countervailing duty laws in Canada at the time of Confederation. It was not until 1904 that Canada amended its Customs Tariff Act[176] to provide for antidumping duties, making it the first country to establish such a regime.[177] A related argument that can be made is that had the drafters of the BNA Act thought about international trade disputes in 1867, they would have created Binational tribunals rather than giving the power to the Section 96 courts. Some evidence for this assertion can be found in the International Joint Commission (IJC) created under the 1909 Boundary Waters Treaty between Canada and the United States.[178]

However, it could also be argued that there is nothing novel about judicial review, a power that was exclusively in the hands of Section 96 courts at the time of Confederation.[179] In *Reference re Young Offenders Act*, the tribunal's power of contempt was one small part of its overall function to provide a different scheme of criminal justice for youth offenders. By contrast, the primary function of the Binational Panel is judicial review. Therefore, it can be argued that Chapter 19 does not form part of a novel jurisdiction, and as such, the analysis must continue.

c. Judicial Function

In discussing the judicial function part of the Section 96 test, the Court in *Residential Tenancies* wrote:

> . . . the hallmark of judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness

174. *Id.* at 269-72.

175. *Id.* at 271.

176. Act to Amend Customs Tariff 1897, S.C., ch.11, (1904) (Can).

177. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 101 (1995).

178. *See* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON, (R. Spencer, et al. eds., 1981); S. Wex, *Boundary Waters Treaty, Article VIII: The Legal Status of the International Joint Commission under International and Municipal Law*, XVI Can. Y.B. Int'l. L., 276 (1978).

179. T.A. Cromwell, *supra* note 83, at 1032.

> and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.[180]

The exercise of judicial review by Chapter 19 Binational Panels is clearly a judicial function. Some authors have tried to characterize the Chapter 19 Panels as arbitration boards and not super-national tribunals in order to ensure that these Panels are not prevented from settling disputes under the Mexican constitution.[181] In light of their procedures and functions outlined above, this argument is not convincing.

d. Institutional Setting

It is a long established principle of Canadian constitutional law that the constitutionality of legislation is to be determined by its substantial essence rather than by its minor or incidental characteristics.[182] For this part of the *Residential Tenancies* test, court must examine the features of the scheme that have been attacked in the context of the overall institutional setting.

With Chapter 19, the primary function of the tribunal is judicial review. It would seem that the institutional setting therefore leads to the conclusion that the Binational Panel process is unconstitutional. The minority's judgment in *MacMillan*, highlights the difficulties the Binational Panel system will face in trying to meet the "institutional setting" test:

> The *Residential Tenancies* test is based on the premise that any judicial power can be transferred from a s. 96 court to an inferior tribunal, provided that the power is ancillary to the tribunal's larger mandate. Shadow courts, devoted exclusively or primarily to rendering judgments which s. 96 courts have traditionally rendered, are forbidden.[183]

Like the *Young Offenders Act* case, one could argue that the Chapter 19 Panels form part of international agreement so they are ancillary to the NAFTA as a whole. But that is not the test. The requirement is that the judicial function is only a small part of the tribunal's mandate.[184] Here it is virtually the tribunal's entire mandate, as was the case in *Residential Tenancies.*

Therefore it would seem that the NAFTA Binational Review Panels

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180. Re Residential Tenancies Act [1981] 1 S.C.R. at 743.

181. *See* Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies*, 3 SW. J. L. & TRADE AM. 431, 433.

182. PETER W. HOGG, *supra* note 74, at 377-79.

183. *See* Madam Justice McLachlin *in* MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 70.

184. Re Residential Tenancies Act [1981] 1 S.C.R. at 736.

may indeed violate Section 96 by conferring judicial power on an inferior tribunal. The best argument against this position is that such a conferral is not unconstitutional because the jurisdiction over antidumping disputes is novel. In any event, as the next section illustrates, it is the removal of judicial review power from the superior courts that is the most constitutionally indefensible aspect of NAFTA's Chapter 19 Panels.

B. *Is the Removal of jurisdiction from Section 96 Courts Unconstitutional?*

In order to answer this question it is first necessary to determine whether judicial review is one of the "core functions" of the Section 96 courts. In *Crevier v. A.G. Quebec*,[185] the Supreme Court held that judicial review of administrative decisions was part of the essential functions of the Section 96 courts and could not be exercised by another tribunal.[186] Chief Justice Laskin wrote for a unanimous Court: "I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review."[187]

In *Crevier*, the *Profession Code* of Quebec governed several professional corporations in that province.[188] It required each corporation to establish a Discipline Committee to deal with allegations of misconduct.[189] Upon a finding of guilt, the Committee had the power to impose a broad range of sanctions.[190] Two members of a professional corporation were convicted by the Discipline Committee and appealed that decision to the Professions Tribunal.[191] The Tribunal quashed the conviction on the basis that the Discipline Committee had exceeded its authority.[192] The complainants then brought a writ before a Quebec Superior Court challenging the constitutionality of the Tribunal. That court found that the Tribunal had wide powers to confirm, alter or quash any decision of the Discipline Committee, and was able to make almost any determination of law, fact or jurisdiction. The Quebec Superior Court concluded that the Tribunal's powers were such as to offend Section 96 of the Constitution.[193] The Supreme Court of Canada agreed, holding that an attempt to insulate a statutory tribunal from any review of its adjudicative functions is unconstitutional under Section

185. Crevier v. Attorney Gen. Que. [1981] 2 S.C.R. 220 (Can.).
186. *Id.* at 237-39.
187. *Id.* at 237.
188. *Id.* at 222.
189. *Id.*
190. *Id.*
191. Crevier [1981] 2 S.C.R. at 223.
192. *Id.*
193. *Id.*

96.[194] A statutory tribunal may not, in the face of Section 96, determine the limits of its own jurisdiction without appeal or review.[195]

Apparently a significant factor in the Court's decision was the fact that the sole function of the Tribunal was to hear appeals,[196] as opposed to exercising final appellate authority as part of an institutional arrangement by way of a regulatory scheme. Chief Justice Laskin wrote: "The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them . . . ."[197]

The Court cited *Residential Tenancies* with approval holding that a scheme will be invalid "when the adjudicative function is the sole or central function of the tribunal so that the tribunal can be said to be operating like a section 96 court."[198]

In *Attorney General v. Farrah*,[199] the Quebec provincial Legislature established a statutory tribunal of appeal with jurisdiction, to the exclusion of any other court, to hear and dispose of an appeal on any question of law.[200] This had the effect of transferring the supervisory jurisdiction of the Quebec Superior Court to the Tribunal, which the Supreme Court of Canada ruled was beyond the power of the provincial legislature by virtue of Section 96. Commenting on *Farrah*, the Court in *Crevier* wrote:

> In short, what the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a Section 96 court.[201]

Applying these cases to the NAFTA Binational Panels, it would seem that there is little doubt they are unconstitutional. Like the tribunal in *Crevier*, they sit on top of the Canadian antidumping and countervailing duty regime. Their primary purpose is judicial review. It could be argued that their judicial review function is an ancillary part of their role of reviewing legislation, however, it is far more likely the case that this supervisory role over legislation is incidental to its dispute settlement function.

The only plausible retort would be that judicial review is not part of

194. *Id.* at 234.
195. *Id.* at 238.
196. Crevier [1981] 2 S.C.R. at 233.
197. *Id.*
198. *Id.* at 233 (citing Tomko v. Labour Relations Bd. (N.S.) [1977] 1 S.C.R. 112 (Can.)).
199. Attorney Gen. Que. v. Farrah, [1978] 2 S.C.R. 638 (Can.).
200. *Id.* at 641-42.
201. Crevier, [1981] 2 S.C.R. at 238.

the "core functions" of Section 96 courts and therefore the Binational Panels are not unconstitutional. There is some support for this position in the academic literature. Speaking about the English superior courts, I.H. Jacob wrote: "The jurisdiction of the High Court to review the decisions of an inferior court cannot, however, nowadays be said to be part of its inherent jurisdiction, for this jurisdiction is exercised by virtue of prerogative orders."[202]

Whether Justice Lamer's "core functions" of the provincial superior courts are co-extensive with Jacob's "inherent jurisdiction" is unclear. In *Residential Tenancies (N.S. 1992)*, Chief Justice Lamer, writing for the minority, concluded that jurisdiction over residential tenancy disputes was not part of the "core" jurisdiction protected by Section 96.[203] Justice Lamer held that core jurisdiction is very narrow and includes "only critically important jurisdictions which are essential to the existence of a superior court . . . and to the preservation of its foundational role within [the Canadian] legal system."[204] Perhaps this definition is so narrow that it excludes judicial review. However, *MacMillan* itself suggests that judicial review would be a "core function."

In upholding the constitutionality of the exclusive jurisdiction of the Youth Courts to try minors for contempt, the dissenting judges in *MacMillan* wrote: "[T]ransfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts, but merely elevated it one remove. Administrative tribunals deal with the factual minutiae of multitudinous disputes; the superior courts ensure that the law is followed and fair process maintained."[205]

This would suggest that with respect to the constitutionality of Chapter 19 of NAFTA, even the minority in *MacMillan* would be concerned over Chapter 19 since it completely ousts the judicial review power of the superior courts in antidumping and subsidy cases.

VI. CONCLUSION

It is unlikely the Supreme Court of Canada will strike down the legislation that implements Chapter 19 of NAFTA as unconstitutional, as it is well aware that the results would be devastating for Canada and the NAFTA system. The Chapter 19 process is an essential part of the free trade regime between Canada and the United States and its demise might spell the end of the entire NAFTA project.[206] If Canada

202. I. H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 49 (1970).

203. Reference re Amendments to the Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186, 224, ¶ 56 (Can.).

204. *Id.*

205. MacMillan Bloedel [1995] 4 S.C.R. ¶ 83.

206. A U.S. official described Chapter 19 as the linchpin of the FTA. *See Remarks by John O. McGinnis, Deputy Assistant Attorney General, United States-Canada Free Trade*

could not carry out its international responsibilities under Chapter 19, it would likely be in fundamental breach of its treaty obligations and either the United States or Mexico could legally withdraw from NAFTA under Article 2205. Even a decision that the Binational Panels were constitutional so long as they did not remove the power of judicial review from the superior courts would be a disaster for Canada-U.S. trade relations.

Instead, the Court will likely utilize one of the arguments outlined above to find that Chapter 19 is either outside the scope of the Section 96 jurisprudence or that it does not violate that section. This can be achieved by finding that the Panels have a novel jurisdiction exercised by no court at the time of confederation, that they are not "judicial" in nature or they are an ancillary part of the entire NAFTA scheme. A court upholding NAFTA's constitutionality would also have to decide that judicial review is not a "core function" of the superior courts or that the "core function" test does not apply to the Federal Courts. All of these arguments are weak, but plausible. However, such judicial acrobatics will only create more confusion in Canadian constitutional law while postponing the real issue for another day. Canada, including the courts, the government and the people, must address the looming confrontations between their constitution and the global economic order - an issue of critical importance that has thus far been ignored.

Chapter 19 is not the only part of NAFTA that raises constitutional problems for Canada. The Canadian Government can bind the country to international obligations under international law. However, international treaties are not self-executing in Canada and do not automatically become Canadian law upon accession. Instead, as a result of the principle of parliamentary supremacy, if the implementation of a treaty requires changes to Canadian law, legislation is necessary. However, the constitutional power to legislate is divided between the federal and provincial governments. The federal Government's trade and commerce power enables Ottawa to regulate interprovincial and international trade, whereas the provincial governments have the power to regulate intra-provincial trade. There is no supremacy clause like there is in the U.S. Constitution that would similarly bind the provinces to the accord.

As international trade agreements shift their focus from tariff to non-tariff barriers, the role of Canadian provinces has increased in the international sphere because of their constitutional jurisdiction over services, labor and investment.[207] These activities fall under provincial jurisdiction that can resist Parliamentary interference, even to implement international law obligations.[208] In the *1937 Labour Conventions*

Agreement: Hearing Before the Senate Comm. On the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases, 100th Cong., 2d, Sess. 96 (1988).

207. Constitution Act, 1867, R.S.C., App. No. 5 § 92 (1985) (Can.).

208. James P. Mcilroy, *NAFTA and the Canadian Provinces: Two Ships Passing in the*

case[209], the Privy Council, struck down legislation enacted by the federal Government pursuant to its obligations under an ILO convention on constitutional grounds.[210] It held that there was no general federal power in Canada to implement international treaties. Instead, Canadian courts are to look at the substantive subject matter of the implementing legislation.[211] If that legislation deals with a matter allocated to the federal Parliament, then Ottawa had the power to implement the treaty.[212] If however, the subject matter is allocated to the provincial legislatures, then Ottawa could not enact treaty-implementing legislation.[213]

With the rising importance of international trade agreements, Canada may soon not be able to afford to have its federal Government without the power to implement legislation in order to comply with international trade obligations when such obligations relate to matters within the provincial jurisdiction. In time, Canada's trading partners may become reluctant to enter agreements with Canada if it cannot guarantee provincial compliance. This potential dilemma is not without possible remedies. The first is obtaining provincial approval before negotiating any international agreement. However this would substantially impede Canada's ability to negotiate and is therefore undesirable. Moreover, it will also lead to provinces withholding their approval in the hopes of gaining some benefit from the federal Government. The second solution is to have the Supreme Court rehear the issue. It is likely that the Supreme Court would depart from the *1937 Labour Conventions* case if given the opportunity to do so. That case was decided more than sixty years ago, by the Judicial Committee of the Privy Council at a time when international treaties did not have the same importance to domestic economics as they do now. The third possibility is a constitutional amendment, expressly granting Parliament the power to implement treaties, regardless of their subject-matter, through legislation that bind the provinces. Which of these three approaches is most appropriate is beyond the scope of this paper but it is another one of the issues Canada must face due to its economic integration through NAFTA.

The dubious constitutionality of the NAFTA Chapter 19 binational tribunals can be resolved through adept judicial maneuvering if re-

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Night?, 23 CAN.-U.S. L.J. 431, 433 (1997).

209. Attorney Gen. Can. v. Attorney Gen. Ont. [1937] 1 D.L.R. 673, (Labour Conventions). Until 1949, Canada's highest court was the Judicial Committee of the Privy Council (J.C.P.C.), which is in fact the House of Lords under another name convened for the purpose of hearing and determining matters originating outside the United Kingdom in the former British Empire. Canada abolished appeals to the J.C.P.C. in 1949, at which time the Supreme Court of Canada became Canada's highest court.

210. *Id.* at 684.

211. *Id.* at 682.

212. *Id.*

213. *Id.*

quired. But it forms part of the larger debate that is best not decided by the courts alone. The questions Canada must face as a nation are: how much sovereignty is it willing to relinquish to the international system in the hopes of economic benefit and when is loss of Canadian identity or culture too high a price to pay?

Chapter 19 of NAFTA is probably not a real threat to Canadian sovereignty and the benefits of free trade under NAFTA surely outweigh the small infringement on the jurisdiction of the Canadian superior courts. However, as NAFTA widens in scope and deepens in commitments, similar issues will arise where the losses and gains may be more evenly balanced. It is important for Canada to face the conflict between free trade and national sovereignty while there is adequate time for significant consultation, debate and reflection. Soon court challenges or international pressure may make a thoroughly considered decision on these issues much more difficult.

"ACCREDITO" ERGO SUM: REFLECTIONS ON THE QUESTION OF REPRESENTATION IN THE WAKE OF THE CAMBODIAN REPRESENTATION PROBLEM IN THE FIFTY-SECOND SESSION OF THE GENERAL ASSEMBLY

ORNA BEN-NAFTALI AND ANTIGONI AXENIDOU*

Between the Idea
And the Reality
Between the Motion
And the Act
Falls the Shadow
T.S. Elliott, The Hollow Men

I. INTRODUCTION

In the shadow land between the procedural rules of the United Nations General Assembly concerning the accreditation of individual delegates[1] and the substantive rules of admission of States contained in the

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1. The Rules of Procedure of the General Assembly do not contain a definition of credentials. Generally, however, credentials may be defined as the documentary evidence of a person's authority. Credentials are usually in the form of letters which on their face indicate the authority and capacity of the bearer. Rule 27 of the Rules of Procedure of the General Assembly provides, *inter alia*, that "[t]he credentials [of representatives] shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs." *Rules of Procedure of the General Assembly*, at 6, U.N. Doc. A/520/Rev.15 (1985) [hereinafter *Rules of Procedure*]. Thus, credentials for the General Assembly may be defined as a document issued by the Head of State or by the Minister for Foreign Affairs of a State Member of the United Nations submitted to the Secretary-General designating the

Charter,[2] lurks the unruly, quasi-rule political validation of representation by governments. Recently, Cambodia found itself obscured by these shadows once again and its seat in the fifty-second session of the General Assembly was vacant.[3] The case of Cambodia offers a starting point for an analysis, both comparative and critical, of the problem of representation in the United Nations. The analysis suggests that, if the issue is to receive appropriate consideration, it must be brought to light as a substantive problem of legitimacy, rather than as a procedural matter of accreditation. It is further proposed that the time may have come for the United Nations to play its proper role as a collective legitimizing agent.A vacant seat means that while Cambodia remains a member State of the United Nations, the Cambodian people have no government authorized to represent them in the General Assembly as well as in other organs of the United Nations.[4] This is a situation of

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persons entitled to represent that Member at a given session of the General Assembly. Unlike the acceptance of credentials in bilateral relations, the question of recognition of a Government of a Member State is not involved, and substantive issues concerning the status of Governments do not [normally] arise. *See* 1971 U.N. Jurid. Y.B. 169-71, para. 3. *See also Scope of Credentials in Rule 27*, U.N. GAOR, Legal Counsel, 25th Sess., Annexes, Agenda Item 3, at 3, U.N. Doc. A/8160 (1970) [hereinafter *Statement by the Legal Counsel*].

2. *See* U.N. CHARTER art. 4, which sets out the principles of membership of States in the Organization and provides, *inter alia*, that membership "is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." On the procedure for admitting new members into the Organization, Article 4 stipulates that such admission is to "be effected by a decision of the General Assembly upon the recommendation of the Security Council."

3. Two sets of credentials were presented to the Credentials Committee in September 1997, which was convened immediately after the opening of the Assembly session for the sole purpose of considering the question of Cambodia's accreditation. Following consideration of the issue, the Committee decided that the consideration of the Cambodian credentials should be deferred. In the United Nations, the issue of Cambodia's representation has surfaced in 1997 for the third time. The legitimacy of that Member State's representation was challenged first in 1973, and then in 1979. For a detailed discussion of those challenges, *see* discussion *infra* section III.

4. The effect of the decision of the Credentials Committee to defer a decision on the Cambodian accreditation is that, as no credentials for any Cambodian representatives have been accepted by the Committee or the General Assembly, and because the previous representative cannot automatically represent his country at the 52nd session, no representative of Cambodia can be seated provisionally pursuant to Rule 29 of the Rules of Procedure of the General Assembly. *See infra* notes 11, 37. As regards the other organs of the United Nations, each principal organ has its own rules and procedures for reviewing credentials of representatives authorized to participate in its work. *See Practice of the General Assembly with regard to the examination of credentials submitted by Member States*, 1985 U.N. Jurid. Y.B. 128 U.N. Doc. ST/LEG/SER.C/23. Consequently, decisions of the General Assembly concerning credentials are not automatically binding on the other principal organs. However, the decisions of the General Assembly with regard to the credentials of representatives of member States to sessions of the General Assembly provide authoritative guidance to other United Nations organs and conferences and, in

substantive consequences to the Cambodian people, to the status of Cambodia and to the authorities purporting to be the representative and legitimate government of Cambodia, yet one occasioned by a procedural decision to defer a decision as to which of the two rival delegations professing to represent Cambodia in the United Nations is to be accredited.[5] The silence of the Charter on the highly political matter of representation has thus once again reverberated in the corridors of power, as the echo of the procedural decision underscores its substantive nature.

The issue of representation is substantively political because it arises whenever there is a challenge to the authority of a government. That challenge can be either internal (*i.e.*, emanating from a situation of competing authorities within the State), or external, when the legitimacy of a government is challenged from sources outside the country, (*i.e.*, governments of other States), but in both cases it questions the legitimacy of the government concerned.[6] The legitimacy of a government, in turn, arguably rests both on its ability to control effectively the territory and receive habitual obedience from the bulk of the population and on the perception that the control it exercises and the obedience it receives signify that its order is worthy of acceptance and thus of recognition.[7] Whereas effective control and routine obedience present variables open to a relatively objective verification process, the perception of the worthiness of a political order is a far more subjective standard. Never-

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practice, the decisions adopted by these organs and conferences always conform to the attitude adopted by the General Assembly in dealing with questions concerning representation and credentials. *See also infra* text accompanying note 28.

5. *See supra* note 3.

6. An internal challenge concerns the situation in which two or more authorities, each claiming to be the lawful government of a member State, issue documents accrediting a delegation to the United Nations. In order to determine which delegation's credentials to accept, it must first be determined which of them is entitled to issue documents of accreditation on behalf of that State. However, the accreditation process has also been used to challenge the legitimacy of a government and its right to represent a member State in the United Nations even when no other rival government or authority exists. Thus, for example, following the 1956 Soviet invasion of Hungary, the legitimacy of the credentials of that State's representation was challenged in the United Nations by the West. *See* Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the United Nations General Assembly*, 7 CAL. W. INT'L L.J. 615, 621-22 (1977); *See also infra* note 72. For further discussion concerning the types of challenges to the representative nature of an authority purporting to be the legitimate government of a Member State of the United Nations, see *infra* text accompanying notes 14-15. Similarly, the legitimacy of the government of South Africa was challenged by the majority of the member States of the United Nations. In that case, the Assembly voted to reject the credentials of the South African delegation and to bar the delegation from participating in its work *See also infra* text accompanying note 25.

7. J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (T. McCarthy trans., 1979), *quoted in* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 709 (1988).

theless, subjectivity is not tantamount to arbitrariness, and it is possible to construct yard-sticks for assessing the worthiness of a government.

The use of rules of procedure to provide solutions to substantive problems is not a phenomenon unique to the international legal system. In the context of the institutional framework of the United Nations, the silence of the Charter on matters of representation, arguably necessitates resort to other available means, including procedural rules, to enable the Organization to relate to developments in the international arena.[8] It is true that the application of procedural rules to substantive problems may not provide for a smooth legal ride, but it does not necessarily follow that the procedural tires are flat and cannot reach their destination safely: if there is a legal framework which provides for fairly determinate rules and, if said rules are applied in a manner that is coherent and consistent, they can persuasively claim to offer a legitimate solution to the problem of legitimacy of governments described above.

But can the legal arena for the political contests be thus characterized? In attempting to answer this question, section II proceeds to outline the contours of the legal framework. The three challenges to the legitimacy of the Cambodian government offer an interesting perspective regarding the manner in which the rules within the legal framework have been applied over time in the Organization and are the focus of section III. The context of this discussion further allows for a comparative analysis with other cases where the United Nations was called upon to validate the legitimacy of alleged governments of Member States. This analytical review of practice allows for an assessment, in the concluding section, of the procedural resolution: is it but a legal mantle, designed to cover the nakedness of power-politics,[9] and achieving that objective with as much success as the Emperor's new clothes, or is it a legitimate, even if imperfect, solution? Can it be improved?

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8. According to Jhabvala,

> [a]lthough the Charter is silent on this contingency [e.g., questions of rival governmental representations] and, in this sense has a 'gap', it cannot ignore such developments. The United Nations, being not only an important part of the international diplomatic scene, but also being composed of sovereign equal member-states, and being an arena where legal and political battles are waged, should develop procedures and rules to deal with this 'gap' within its constitutional framework.

Jhabvala, *supra* note 6, at 618.

9. Brierly's description of international law as no more than "an attorney's mantle artfully displayed on the shoulders of arbitrary power" may well apply to the procedural resolution of the accreditation question. J. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 13 (quoting Sir Alfred Zimmern), *quoted in* Franck, *supra* note 7, at 706.

II. THE LEGAL FRAMEWORK

There are three aspects of States' participation in the political organs of the United Nations: membership of States, representation of governments and credentials of delegates.[10] The first aspect is regulated by relevant provisions in the Charter of the United Nations as well as by procedural rules;[11] the second aspect is regulated by rules of procedure;[12] and the third representation aspect is unregulated in either the Charter or the rules of procedure.[13]

Theoretically, the silence of the Charter on the question of representation may be construed in two ways: either there is no *lacuna* and that which appears unregulated, in substance does express a legal regime wherein the United Nations is not empowered to pronounce on the

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10. *See, e.g.*, R. Higgins, The Development of International Law Through the Political Organs of the United Nations, 151 (1963).

11. *See Rules of Procedure, supra* note 1. *See also Rules of Procedure, supra* note 1, at 29-30, comprising Rules 134 through 138, and dealing with the admission of new members to the United Nations.

12. Rules 27 through 29 of the Rules of Procedure entitled "Credentials" provide as follows:

> **Rule 27: Submission of credentials**
> The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the date fixed for the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.
> **Rule 28: Credentials Committee**
> A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.
> **Rule 29: Provisional admission to a session**
> Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision.

Rules of Procedure, supra note 1, at 6-7.

13. This aspect of representation of governments, however, involving a decision as to the legitimacy of an authority purporting to be the government of a Member State of the United Nations ha s arisen several times in the history of the Organization , as is detailed below. Since the United Nations is composed of sovereign Member States and provides the arena where political, legal and procedural battles are waged, there is a need for a legal regime to regulate the decision on the legitimacy of such an authority. Without such a regime, the substantively political issue of representation is dealt with in the same manner and by the same rules governing the procedural and formal issue of credentials, to the detriment of the ability of the Organization to deal with both issues satisfactorily. On the relations between approval of credentials of a representative by the General Assembly and the legitimacy of the government issuing the credentials, see, for example, H. KELSEN, THE LAW OF THE UNITED NATIONS, 947 (1964).

representational rights of governments, or, there is a *lacuna* which cannot be tolerated and has to be filled. Ironically, while the first approach rests on an expansive view of law, as it deems that nothing is ever beyond law's reach, its application in practice has an effect as restrictive as it is unsatisfactory: it deprives the Organization of the ability to respond to challenges to the representational rights of governments. As such challenges do arise in practice and require a determination on the part of the United Nations, lest it loses its viability to react to important developments, the second approach has been overwhelmingly embraced, and the main effort had been directed at devising ways and means for bridging the gap. [14] This effort has produced a legal regime designed to deal with problems of representation. [15]

Our analysis suggests that a legal regime governing questions of representation has to relate to the following elements: (i) definition of the problem: the type of challenges to representation to which the regime applies; (ii) determination of the best available means within the existing institutional framework for resolving challenges to representation; (iii) articulation of the criteria to be applied in making a decision; (iv) choice of the appropriate forum for decision-making; and, (v) delimitation of the type of actions to be taken and the consequences to be emanating therefrom. A determination of each of these elements affects the rest. The remaining part of this Section offers an analysis of each of these elements, as well as of the manner in which they are interrelated.

As regards the definition of the problem, two types of challenges to the representative authority of a purported government may arise: an internal challenge emanating from a situation of competing authorities each claiming to be the legitimate agent for the State, and an external challenge to the legitimacy of a sole authority.[16] The latter may be divided into two subcategories: 1) doubting the very existence of the objective prerequisites of the authority, and 2) questioning its subjective qualifications.[17] Each and every type of challenge raises the issue of

14. The need for the distinction between credentials and representation and the subsequent need to fill the lacuna, was initially brought up by Cuba in the context of the Chinese representation problem. For Cuba's letter to the Secretary-General stating, *inter alia*, that "the distinction between credentials and representation is an undeniable legal and political reality," see U.N. GAOR, Annexes, Agenda Item 61, U.N. Doc. A.1308 (1950). Thereafter, there have been several attempts to devise a legal regime. *See, e.g., Letter Dated 8 March 1950 from Secretary-General to President of Security Council Transmitting a Memo on Legal Aspects of Problems of Representation in United Nations*, U.N. SCOR, 5th Sess., Supp. Jan.-May 1950, U.N. Doc. S/1466 (1950) [hereinafter *Secretary General Letter*]; *Recognition by the United Nations of the Representative of a Member State*, G.A. Res. 396(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (1950); *Statement by Legal Counsel, supra* note 1.

15. *Id.*

16. *See supra* note 6.

17. *See supra* note 7. This is so because legitimacy is based on both the objective cri-

representation and arguably all have to be determined by the application of identical criteria,[18] but only the internal challenge arises directly in the context of the accreditation process.[19] One consequence of this categorization is that both the means and the forum best suited to deal with representation issues should be able to encompass all types of challenges to representation.

Within the institutional framework of the United Nations, the means best suited for resolving the problem as defined above would have been an amendment to the Charter, supplemented by an amendment to the rules of procedure of both the Security Council and the General Assembly.[20] Such an amendment could have encompassed all types of challenges to representation, related accordingly to the other relevant aspects of the issue, including the substantive criteria for the determination of each type of challenge and an indication of the appropriate forum to apply said criteria. Such an amendment could have further eliminated the risk of a legal regime wherein procedural rules are extended to respond to substantive political issues in a manner that may contravene the basic principles of the Charter, ranging from intervention in the domestic affairs of States to the separation of powers between the Security Council and the General Assembly. Alas, this potentially most comprehensive, determinate and coherent option is yet to be translated into a reality in the institutional life of the United Nations.[21]

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terion of the governments' ability to exercise effective control over the territory and enjoy habitual obedience from the bulk of the population and the subjective criterion involving the perception of the worthiness of its control over the land and the people.

18. Jhabvala, *supra* note 6, at 630.

19. Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 AM. J. INT'L L. 179, 183 (1984).

20. Jhabvala, *supra* note 6, at 619.

21. It should be noted, however, that the Charter may be construed as providing a legal guidance for dealing with questions of representation whereby the Security Council is empowered to determine, in the context of its discussion on matters affecting peace and security, that a government does not exist or, perhaps, even that it is not otherwise legitimate. Thus, for example, in the case of Somalia, the position of the Security Council is that no government is currently functioning in Somalia. See, for example, S.C. Res. 897, U.N. SCOR, 3334th mtg., U.N. Doc. S/Res/897 (1994) and S.C. Res. 954, 49th Sess., U.N. SCOR, 49th Sess., 3447th mtg., U.N. Doc. S/Res/954 (1994), in which the Security Council referred to "exceptional circumstances, including, in particular, the absence of a government in Somalia." *See also* S.C. Res. 865, U.N. SCOR, 48th Sess., 3280th mtg. at 2, U.N. Doc. S/Res/865 (1993), in which the Security Council noted with great concern "the absence of law enforcement and judicial authorities and institutions in the country as a whole." As a result, there is no government which can represent Somalia in the United Nations, and credentials issued by authorities claiming to represent Somalia would not be accepted by the Secretariat. Such determination by the Security Council, however, while affecting representation, is incidental to the main issue before the Security Council and cannot be construed as representing a legal regime designed specifically to deal with matters of representation.

A second best alternative in terms of normativity would have been an amendment to the rules of procedure. In practice, however, the means adopted as the vehicle articulating the legal regime to be applied to the question of representation was a General Assembly resolution.[22] Consequently, the legal regime thus established was constrained *ab initio* by that which is within the competence of the General Assembly to decide upon in light of the principles and provisions of the Charter.[23] Indeed, the General Assembly seems to have been cognizant of this constraint when it limited the applicability of the regime established in its resolution to "whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes a matter of controversy in the United Nations."[24] It follows that the legal regime that was being established to regulate representation questions was consciously limited to one type of challenge to the representative authority of a government, that emanating from within. This limitation was further emphasized by the Legal Counsel of the United Nations in his statement on the "scope of 'Credentials' in Rule 27 of the Rules of Procedure of the General Assembly." Here the point was made that the rejection of credentials of a

22. G.A. Res. 396(V), *supra* note 14, at 24-25. The operative parts of the General Assembly resolution read as follows:

> 1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;
> 2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;
> 3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;
> 4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;
> 5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate.

23. The legally binding nature of the General Assembly's resolutions in general, and in this context in particular, has been amply discussed elsewhere. *See, e.g.*, Christopher C. Joyner, *UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981); B. Sloan, *General Assembly Resolutions Revisited (Forty Years Later)* 58 BRIT. Y.B. INT'L L. 39 (1987); P.C. Szasz, *General Law-Making Processes*, in 1 UNITED NATIONS LEGAL ORDER 35, 62-67 (Oscar Schachter & Christopher C. Joyner eds., 1995).

24. *See* G.A. Res. 396(V), *supra* note 14, at para. 1.

delegate of a government where there are no rival claimants is outside the scope of Rule 27 of the Rules of Procedure and would, in effect, violate the Charter.[25] This conclusion remains valid today despite the existence of various instances where external challenges to the legitimacy of governments have been raised in the context of examining the credentials of their delegates by the General Assembly.[26] This is so because the only common denominator of that practice is that it has been as inconsistent as it has been contested. Such a practice lacks the essential characteristics of a legal regime.[27]

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25. The statement by the Legal Counsel on the "Scope of Credentials in Rule 27 of the Rules of Procedure of the General Assembly," which was submitted to the President of the General Assembly at its request, separates the issue of credentials to an international organization from that of recognition of a government of a Member State. It further distinguishes between cases where there are rival claimants and where there are no such rivals and asserts that,

> [s]hould the General Assembly, where there is no question of rival claimants, reject credentials satisfying the requirements of Rule 27 for the purpose of excluding a Member State from participation in its meetings, this would have the effect of suspending a Member State from the exercise of rights and privileges of membership in a manner not foreseen by the Charter . . . [T]he participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership. Suspension of this right through the rejection of credentials . . . would . . . be contrary to the Charter.

Statement by the Legal Counsel, supra note 1. This statement by the Legal Counsel has been criticized by Jhabvala, *supra* note 6, at 633-35.

26. Thus, for example, the South African government representatives were prevented from representing that country in the General Assembly in 1974 and 1981 by a rejection of their credentials by a majority in the General Assembly. Consequently, South Africa found itself in a position similar to that of a Member State suspended from the exercise of the rights and privileges of membership under Article 5 of the Charter. On the South African question and the rejection of South Africa's credentials, see, Abbott et al., *The Decredentialization of South Africa*, 16 HARV. INT'L L.J. 576 (1975); Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT'L & COMP. L.Q. 351 (1976); Gerhard Erasmus, *The Rejection of Credentials: A Proper Exercise of General Assembly Powers or Suspension by Stealth?*, S. AFR. Y.B. INT'L L. 40 (1981); Jhabvala, *supra* note 6, at 633; E. McWhinney, *Credentials of State Delegations to the UN General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa*, 3 HASTINGS CONST. L.Q. 19 (1976); M.E. Muller, *Discussions and Resolutions on South Africa in the United Nations - 1979*, 5 S. AFR. Y.B. INT'L L. 164 (1979). A similar, albeit unsuccessful attempt was made in 1982 to exclude Israel from participating in the United Nations through the accreditation process. *See* Halberstam, *supra* note 19.

27. Thus, for example, the decision of the majority of the General Assembly to prevent the participation of South Africa in its work at the 29th session was not consistent with the previous practice of that body in the years 1970 to 1974, in which South Africa continued to participate under the 1970-ruling from E. Hambro, the Norwegian President of the General Assembly, even after the delegation's credentials had been rejected. *See supra* note 25. The previous practice of the Assembly so far does not demonstrate an *opinio juris* of its members as to the legal effect of the rejection, or even the challenge, of the credentials of a delegation. Instead, "[g]enerally speaking, member States have adopted one stand or the other according to the circumstances of individual cases, and it

The General Assembly, having thus undertaken to establish a legal regime governing challenges to representation stemming from the existence of more than one authority claiming to be the government of a member State, proceeded to articulate the criteria by which a decision will be made. According to paragraph 1 of resolution 396 (V), such questions shall be considered "in light of the Purposes and the Principles of the Charter and the circumstances of each case."[28] The indeterminate nature of this standard, achieved after more concrete proposals, ranging from a detailed articulation of the objective test[29] to the enumeration of yard-sticks for the evaluation of the subjective aspect of legitimacy[30] have been rejected.[31] This indicates that member States have opted for a political, rather than a principled, decision.[32] Indeed, the resolution stands in stark opposition to a 1950 memorandum of the Secretary-General on "the Legal Aspects of the Problem of Representation in the United Nations."[33] This memorandum suggested that the decision on representation should favour the claimant which exercises

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seems that in making their decisions they were motivated by political, rather than legal, considerations." *See* Ciobanu, *supra* note 26, at 368. Ciobanu further observes that, not only is the practice far from settled or undisputed, but Member States "have changed their legal position on the issue from one session to another" and "on several occasions, in one and the same meeting of the Credentials Committee or the General Assembly, representatives of States have advocated the power . . . [to inquire into the matter of representation] and denied it in another." *Id.* at 367. Accordingly, such inconsistent practice cannot be said to provide for a legal regime.

28. *See* G.A. Res. 396(V), *supra* note 14.

29. Thus, for example,

> [a] British proposal had recommended that 'the right of a government to represent the Member State' in the United Nations be recognized if it 'exercises effective control and authority over all or nearly all the national territory, . . . in such a way that this control, authority and obedience appear to be of a permanent character.'

See Jhabvala, *supra* note 6, at 631 (citing U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 6, 8, U.N. Doc. A/1308 (1950)).

30. It is also worth noting that, pursuant to a proposal by Cuba,

> representation questions [would] be decided in the light of (1) effective authority over the national territory, (2) the general consent of the population, (3) ability and willingness to achieve the purposes of the Charter, to observe its principles, and to fulfill international obligations of the state, and (4) respect for human rights and fundamental freedoms.

Id. (citing U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 5, U.N. Doc. A/1308 (1950)). Also see the recommendations of the subcommittee, to which the question of the representation of a Member State had been referred, "that 'effective control over the territory,' general acceptance by the population, willingness to accept Charter responsibilities, and the extent to which the authority in question had been established through 'internal processes in the Member State' be 'among the factors to be taken into consideration.'" *Id.* at 631-32.

31. Jhabvala, *supra* note 6, at 630-35.

32. *Id.*

33. *Secretary General Letter*, *supra* note 14.

effective control over the territory and enjoys habitual obedience by the bulk of the population.[34] This document thus proposed to limit the decision to the objective component of the legitimacy of an authority claiming to represent a member State and competent to issue credentials. The resolution of the General Assembly, however, is otherwise predisposed. The indeterminacy of its standard does allow for flexibility, but forfeits the very objective of establishing criteria for decision-making that can be viewed as legitimate.

Nevertheless, there are several limits to the free reign of politics in determining questions of representation inherent in both the definition of the subject-matter and in the competence of the organs establishing the legal regime. The authority of the General Assembly is limited by the normative superiority of the provisions and principles of the Charter, as indeed is acknowledged in resolution 396 (V). It follows that the Charter's delineation of powers between the General Assembly and the Security Council, as well as the principle enshrined in Article 2(7) of the Charter safeguarding the domestic jurisdiction of States from intervention by the United Nations, would operate to limit its capacity to determine the issue of representation.[35] Furthermore, the consequence of defining the subject-matter as relating exclusively to an internal challenge to the legitimacy of a purported government, was that whatever substantive criteria were to apply, their application would be limited to the need to decide between rival authorities.[36] That need arises, as a matter of course, during the accreditation process which requires a determination on representation.[37] This process is governed by existing Rules of Procedure, which thus present a further limitation on the decision-making process.[38] Indeed, the genesis of the General Assembly's resolution 396(V) points to the link between the subject-matter and accreditation,[39] and the above-mentioned statement of the

34. *Id.*

35. *See* Marc B. Dorfman, et al., *United Nations 28th Session, Notes: Cambodian Representation*, 15 HARV. INT'L L.J. 495, 498-500 (1974).

36. *See* G.A. Res. 396(V), *supra* note 14, at para. 1 (referring to the situation in which "more than one authority claims to be the government entitled to represent a Member State in the United Nations.").

37. *See supra* note 12 for Rules 28-29 of the rules of Procedure of the General Assembly. The issue of the appropriate forum for the determination of representation questions is discussed *infra* text accompanying notes 44-65.

38. *Id.*

39. General Assembly Resolution 396(V) is the offspring of the Chinese representation question. At the request of the Cuban representative, the question of recognition by the United Nations of the representation of a government was placed in the agenda of the 5th session of the General Assembly. In his letter, the Cuban representative explained that,

> [t]he item proposed to the General Assembly's consideration does not refer only to the formal problem of credentials, but to the problem that arises with regard to the legality of the representation of a Member

Legal Counsel regarding the scope of Article 27 of the Rules of Procedure further emphasized the limiting effect of this link.[40] The Legal Counsel's statement defined "credentials" as "a document issued by the Head of State or Government or by the Minister of Foreign Affairs designating the persons entitled to represent that Member at a given session of the General Assembly," and proceeded to draw a distinction between the substantive issue concerning the status of a Government of a member State and the issue of credentials.[41] It further affirmed the practice of piercing beyond the technical issue of credentials into the identity of the authority issuing them in instances involving rival claimants, and, in light of Article 5 of the Charter, limited that action only to such instances.[42]

Implicit in the Legal Counsel's reference to the precedents of the Congo and Yemen, where the question as to which claimant represented the true government of a State arose in connection with the examination of credentials, was the acceptance of the objective criterion that had been employed in both instances to answer that question.[43] The preference accorded to the objective criterion is further underscored by the conspicuous absence of any reference to the General Assembly's resolution 396(V) in the statement of the Legal Counsel. The analysis of the Statement by the Legal Counsel thus suggests that it had attempted to strengthen the nexus between the internal challenge to the legitimacy of a government and the procedural aspect of accreditation of individuals and to weaken the link between that challenge and the substantive aspects of membership of a State. As resolution 396(V) adopted language quite reminiscent of the language of Article 4 of the Charter, the only conclusion that can be reached is that the Legal Counsel attempted subtly to limit recourse to the broadly subjective criteria of the resolution and to encourage resort to the narrower objective

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State; that is when the United Nations has to decide which government has the right to represent that State in the Organization.

Recognition by the United Nations of the Representation of a Member State, U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 4, U.N. Doc. A/1308 (1950). Following consideration of and debate on this item by the *Ad Hoc* Political Committee of the General Assembly and a subcommittee, the Assembly adopted the report that was submitted to it by the *Ad Hoc* Political Committee which also included the draft that became General Assembly Resolution 396(V). *See supra* note 14. In the absence of guidelines both in the Charter and the Rules of Procedure in matters of rival claimants and contested representation, the Resolution was intended to fill the *lacuna*, but it contains only general, vague criteria for such determination.

40. *See Statement by the Legal Counsel, supra* note 1.

41. *Id.* at para. 3.

42. *Id.*

43. On the question of the Congo representation, see *infra* text accompanying notes 106-113; on the matter of the Yemen representation, see *infra* text accompanying notes 103-105.

criterion of effectiveness in resolving matters of representation.

The nexus between representation and accreditation is also apparent in the choice of the appropriate forum for determining which rival authority represents the State. The question of representation may come up before any of the organs of the United Nations or those of its Specialized Agencies. In order to prevent conflicting decisions, the General Assembly appointed itself as the organ whose determination of such questions "should be taken into account in other organs of the United Nations and in the Specialized Agencies."[44] In the General Assembly, the issue may arise as a separate agenda item in the Plenary Session,[45] or in a Special Committee appointed by the General Assembly to consider the matter, or in the Credentials Committee.[46] A decision taken by each such forum ultimately must decide between the comparative merits of the competing claims. However, the competence of the Credentials Committee is limited by the Rules of Procedure governing its consideration in ways in which the deliberations of the General Assembly or of a Special Committee created by the General Assembly are not.[47]

The net result of the above is that if the decision is channeled to the Credentials Committee, the applicable standard should be limited to

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44. *See* G.A.. Res. 396(V), *supra* note 14, at para. 3. Indeed, in practice, such questions are referred to the General Assembly by both the Security Council and the Specialized Agencies.

45. The question of rival credentials and the legitimacy of the authority issuing them can be presented either as a credentials question at the annual review of credentials by the Credentials Committee or be considered under a separate agenda item by the General Assembly. The former has the advantage of providing an already existing forum which would consider the question as a procedural issue, rather than as a substantive question of representation which might be blocked by the restriction in Article 2(7) of the Charter concerning intervention in the domestic affairs of a member State. On the manner in which this issue was dealt with in the first phase of the representation of Cambodia, see *infra* text accompanying note 113. *See also Statement by the Legal Counsel, supra* note 1, at para. 4, which states that,

> [w]hile the examination of credentials, both in the Credentials Committee and in the General Assembly, is a procedural matter limited to ascertaining that the requirements of Rule 27 have been satisfied, there have nevertheless been a few instances involving rival claimants where the question of which claimant represents the true government of the State has arisen as a substantive issue. This issue of representation may, as in the case of the Republic of Congo (Leopoldville) at the fifteenth session and Yemen at the sixteenth session, be considered in connection with the examination of credentials, or it may, as in the case of China, be dealt with both in connection with credentials and as a separate agenda item.

46. *See Statement by the Legal Counsel, supra* note 1, at para. 4.

47. This is so because the only relevant rules of procedure, i.e., those concerning credentials, apply to the Credentials Committee and not to the General Assembly or its Special Committee. Accordingly, the deliberations of those latter organs are not limited by those procedural rules.

the objective aspect of the legitimacy issue, inquiring into the comparative effectiveness of the claimants.[48] If, however, the issue comes up before the General Assembly or before a Special Committee, the more vague criteria of resolution 396(V) are likely to be employed. While the concept of legitimacy does encompass both objective and subjective aspects, the application of the objective criteria does not necessarily yield the same result as the application of the subjective standard. This is so because, analytically, a claimant may be both effective and worthy of the obedience it commands; it may be either effective or worthy of obedience and it may be neither. While it is possible to minimize the potential for conflicting results by a clear determination of the components comprising the subjective standards, resolution 396(V) did not make this determination.

The final element in the construction of a legal regime to govern the question of representation concerns the delimitation of the types of action that may be taken and the consequences emanating therefrom. Here, the governing rules are the following: if a problem of representation is raised in the context of the Credentials Committee, the Committee may decide that a claimant authority is a representative government and approve the credentials of its delegates. The Committee may also decide that the claimant authority is not a representative government and reject the credentials of its delegates, or it may decide to defer its decision.[49] Having determined the matter in any of these ways, the Committee reports its decision to the General Assembly and includes in its report a draft resolution.[50] The General Assembly proceeds to resolve whether to approve the report as is, to amend it, or to reject it.[51] The Committee does not, however, resolve on matters of representation that have come before the Credentials Committee prior to the latter's submission of its report.[52] A similar process occurs if and when a Special Committee is entrusted with deliberating a matter of representation.[53] Finally, the General Assembly may discuss representation as a special item on its agenda and, in this case, its determination is not contingent upon submission of a report by the Credentials Committee.[54]

The consequence of a decision to accept the representative nature of an authority is that the credentials issued by said authority entitle its delegates to represent the State in the organs of the United Nations and its Specialized Agencies, according to the particular specifications

48. On the components of "legitimacy," see *supra* text accompanying notes 6-7.

49. *See* Dorfman, *supra* note 35, at 501-02. For the practice of the Credentials committee, *see also* Rules 28 and 29 of the *Rules of Procedure*, *supra* note 12.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Rules of Procedure*, *supra* note 12, at Rules 28 and 29.

54. *Id.*

of the credentials.[55] The result of a negative decision on representation is that the State will not be represented in the United Nations system.[56] Pending a decision, and pursuant to Rule 29 of the Rules of Procedure of the General Assembly, the delegates whose participation has been challenged continue to represent the State on a provisional basis.[57] It follows that a decision not to decide at a particular point in time, often motivated by a wish to await for the conclusion of a domestic battle, itself expresses a choice which favors the incumbent authority.[58] If, however, the delegates whose participation is challenged have not been fully and specifically authorized prior to the challenge to represent the State in all organs of the United Nations, no representative of the State may be seated provisionally pursuant to United Nations practice.[59] The practical result in this latter circumstance is identical to that emanating from a negative decision on the representational nature of the authority purporting to be a government, though the symbolic significance of each decision may be quite distinct.[60] In summary, it appears that the legal framework established for resolving the issue of representation provided for the following: 1) it defined the issue as one emanating from an internal challenge and did not give guidance for dealing with external challenges; 2) it was set up in the form of a General Assembly resolution and was thus inherently limited in both scope and substance by the normative superiority of the Charter; and 3) it determined that the most appropriate forum for deciding the issue is the General Assembly, inclusive of its relevant committees.[61]

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55. *Id.*

56. *Id.*

57. *See Rules of Procedure*, *supra* note 1. For the text of the Rule, see *supra* note 12.

58. The incumbent delegate continues to participate so long as no determination is made on challenged credentials. While such participation is indeed provisional, it is nevertheless the candidate that continues to represent the State and not the delegate of the rival government.

59. This is, for example, the case of Prince Sisowath Sirirath, whose credentials had been signed in 1993 by King Norodom Sihanouk, and who had been for the following four years Cambodia's Permanent Representative to the United Nations. Prince Sisowath Sirirath was one of the supporters of the former First Prime Minister, Prince Ranariddh. Pursuant to his credentials, Prince Sisowath Sirirath was accredited only to the United Nations, which in United Nations usage means that he was not *per* se accredited to sessions of the General Assembly. He could not, therefore, automatically benefit from the application of Rule 29 of the Rules of Procedure in his case and be seated provisionally at the 52nd session of the General Assembly. *See Representation of a Member State in Organs of the United Nations - Requirement of Full Powers under the Rules of Procedure of the Principal Organs of the United Nations - Designation in the Credentials of Permanent Representatives of the Organs before which they are authorized to act*, 1977 U.N. Jurid. Y.B. 191, U.N. Doc. ST/LEG.SER.C/15.

60. This is so because a negative decision, unlike a deferment of a decision, in effect, delegitimizes the previous government and confers legitimacy on the new government.

61. *See supra* text accompanying notes 46-47.

The most relevant committee in both theory and practice is the Credentials Committee and thus the link between the representative nature of a government and the credentials of its individual delegates was strengthened, whereas the link between the representational nature of a government and the membership of the State it purports to represent was weakened. The net result of the above was that the means most likely to determine the issue of representation were procedural and a further limitation on the decision-making process thus emanated from the existing Rules of Procedure which govern the deliberations of the Credentials Committee. However, the substantive criteria according to which the determination was to be made were inconsistent with the procedural means adopted and, potentially, with the substantive provisions of the Charter and the institutional structure of the United Nations.[62] Decisions on representation made "in light of the Principles and Purposes of the Charter and the circumstances of each case"[63] are bound to generate more political heat than legal light. Indeed, the impregnation of existing procedural rules with political seeds tends to produce rather androgynous off-springs and more problems than solutions. In lieu of clarifying the decision-making process, the standard articulated in resolution 396(V) further confused the relative positions of the components of the "unholy trinity" of membership (States), representation (governments) and accreditation (individuals) and, in the process influenced the composition of the Credentials Committee and rendered it contentious.[64]

The legal framework thus appears to be somewhat short of achieving its objective. Insofar as the very purpose of establishing a legal regime is to provide such guidance, it is our understanding, to paraphrase Gertrude Stein, that the General Assembly has undertaken to over-

62. *See supra* text accompanying notes 35-42.

63. *See supra* text accompanying note 23.

64. In accordance with Rule 28 of the Rules of Procedure, the Credentials Committee consists of nine members appointed at the beginning of each session by the General Assembly on the proposal of the President. *Rules of Procedure, supra* note 1, at 6. Rule 28 does not mention any geographical distribution. However, for more than twenty years, the Committee has traditionally consisted of representatives from China, the Russian Federation/USSR, the United States, two Member States each from Africa and Latin America, and one Member State each from Asia and from Western Europe. During the 51st session, the President of the Assembly, Mr. Razali Ismail, Permanent Representative of Malaysia to the United Nations, had questioned what he termed the permanent membership on the Committee of China, the Russian Federation and the United States, and the absence from the Committee of representatives of Arab States. Nevertheless, the membership of the Credentials Committee for the 52nd session of the General Assembly was comprised of representatives from countries of the same geographical regions and consisted of representatives from the following Member States: Argentina, Barbados, Bhutan, Cote d'Ivoire, Norway, Russian Federation, United States of America and Zambia. *See* U.N. GAOR, Cred. Comm., 52d Sess., Agenda Item 3, U.N. Doc. A/52/719 (1997).

throw its undertaking.[65] Nevertheless, a legal framework, imperfect as it was, had been established. It remains to be determined whether the practice of the United Nations has enhanced principled consistency or political expediency, and whether it has augmented or diminished the United Nations' ability to command respect for the validation it bestows on governments. It is into the review of this practice, through the prism of the question of Cambodia's representation, that we now turn.

III. THE REPRESENTATION OF CAMBODIA

It was once observed that the people of Crete make more history than they can consume.[66] That observation holds true of many other countries and peoples and the story of Cambodia is one such case. In the context of the United Nations' validation of representative governments, Cambodia is thus far the only State the representative authority of which was challenged from within on three occasions.[67] The analytical review of these challenges, interwoven with other cases for comparative purposes, thus offers a comprehensive perspective for the study of the practice of the United Nations as it relates to matters of representation involving rival claimants.

A. *First Challenge - 1973*

The roots of the 1973 challenge to the representative nature of the government of Cambodia were grounded in a coup staged by the then Prime Minister, General Lon Nol, against the then Head of State, Prince Sihanouk.[68] Economic discontent and political disquiet generated by hostility towards the presence of the North Vietnamese and Viet-Kong troops in the Eastern provinces of the country weakened the Prince's hold over the country and prompted the American-backed General to use the opportunity of the Prince's absence from the country to oust him as Head of State on March 18, 1970. The action was unanimously endorsed by the National Assembly and the symbolic seal of the new order was the change of the name of the State to "The Khmer Republic."[69] The new government issued the credentials of its delegates to the United Nations.[70] They met with no challenge, were accepted by

65. One of Ms. Stein's famous quips was: "I understand you undertake to overthrow my undertaking." BARNES & NOBLE, BOOK OF QUOTATIONS, 201 (R.I. Fitzhenry ed., 1987).

66. "SAKI" (H.H. MUNRO), THE CHRONICLES OF CLOVIS (1911).

67. The first challenge to the representative authority of the Cambodian Government occurred in 1973 and is analyzed.

68. For a factual account, see Dorfman, *supra* note 35, at 496-97.

69. *Id.* at 495; John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971).

70. G.A. Res. 2636 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 6, U.N. Doc. A/8028

the Credentials Committee and endorsed by the General Assembly.[71]

This acceptance of the credentials issued by a new government which came into being following a radical change of regime reflected common practice in the United Nations. In all previous such instances, including cases where the new government clearly owed its being to the armed intervention of a foreign power, the government was regarded as the legitimate authority of the State. This practice underscores the preference given to the objective criterion of effective control over other conceivable considerations.[72] The situation when there is an internal

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(1970), *revised by* U.N. Doc. A/8028/Corr. 1.

71. *Id.*

72. Following a coup d'etat in Czechoslovakia in 1948 and in Cuba in 1959, the new governments sent their delegates to the United Nations and, as there was no internal challenge to their legitimacy, the delegates were accredited as a matter of course. *See, e.g., Resolutions Adopted by the General Assembly: Verification of Credentials,* U.N. GAOR, 3d Sess., Res., pt. I, U.N. Doc. A/810 (1948). In the case of Czechoslovakia, the Security Council, following a Chilean initiative, did adopt a resolution inviting the ousted Permanent Representative of Czechoslovakia to participate in its deliberation. It did so under Rule 39 of its Rules of Procedure, which concerns the Security Council's right to invite members of the Secretariat or other persons to supply it with information in the examination of matters within the Council's competence. *See Provisional Rules of Procedure of the Security Council,* U.N. Doc. S/96/Rev.7 (1982). Accordingly, no issue of representation was further raised. *See* U.N. SCOR, 3d Sess., No. 36-51, 268th mtg., at 106-110 (1948). Note further that the same practice continued in later years, as illustrated, by the acceptance of the credentials of the delegates of Chile's Pinochet Government in 1973. Indeed, even when the new government owed its power and was in effect set up by a foreign State, subject to snide comments made by States on the opposite side of the political fence, the credentials issued by these governments were normally accepted by the Organization without much ado about representation. This was evidenced in the cases of Afghanistan following the armed intervention by the Soviet Union. For the case of Afghanistan, see U.N. GAOR, Cred. Comm., 35th Sess., Annexes, Agenda Item 3, addendum 1, 2, U.N. Doc. A/35/484 (1980). For the case of Grenada, following the armed intervention by the United States in 1983, see U.N. GAOR, Cred. Comm., 35th Sess., Agenda Item 3, addendum 1, U.N. Doc. A/39/574/Add.1 (1984), which was approved by the Assembly in G.A. Res. 39/3B (1983). Note also that, in the case of Panama following the 1989 fall of Noriega, the Security Council met at the end of 1989 to discuss the situation and was requested by representatives of both the new government and the previous government to be invited to the discussion. The Secretary-General reported that he was not in a position to assess the factual situation. *See* U.N. SCOR, 44th Sess., at 3, U.N. Doc. S/21047 (1989). The issue was resolved when both claimants gave up being heard. *See* U.N. SCOR, 44th Sess., U.N. Doc. S/PV.2902 (1989). The General Assembly took no action on the report of the Credentials Committee in its 45th session and, by its Decision 45/55 taken at its 72nd plenary meeting on December 21, 1990, it decided to retain item 3(b) in its agenda. Item 3(b) concerned the report of the Credentials Committee. For the report of the Credentials Committee, see U.N. GAOR, Cred. Comm., 45th Sess., Annexes, Agenda Item 3, U.N. Doc. A/45/674 (1990). For the Assembly decision, see U.N. GAOR, 45th Sess., vol. I, Supp. No. 49A, U.N. Doc. A/45/49 (1990). The only exception to be noted in this context concerns the challenge to the credentials issued by the Government of Kadar, established with the support of the Soviet armed forces in Hungary in 1956. Beginning at the eleventh session of the General Assembly and for seven years thereafter, the representative nature of the Kadar government was challenged by Chile. In each instance the General Assembly de-

challenge to the legitimacy of a revolutionary regime is, however, far less clear.

Such a challenge was presented to the government of Lon Nol when, on May 5, 1970, the ousted Prince Sihanouk announced from his Peking refuge, the formation of a rival government, the Royal Government of National Union in Cambodia (hereinafter RGNUC).[73] The situation on the ground at the time was unclear. General Lon Nol, assisted by both South Vietnam and the United States was attempting to drive the North Vietnamese troops from the Eastern provinces of Cambodia.[74] The latter joined forces with native Khmer forces in a fight against Lon Nol's army and it was on their allegiance that Prince Sihanouk relied in forming RGNUC. While it was clear that Lon Nol controlled the capital, whereas the Prince remained in Peking, it was also evident that both sides controlled substantial portions of the country and that neither could claim effective control over all the territory much less habitual obedience on the part of the bulk of the population.[75] It was against this background that the Secretary-General received a letter, dated October 8, 1973, from Prince Sihanouk, requesting that an additional item, providing for the "restoration of the lawful rights of the Royal Government of the National Union in Cambodia in the United Nations"[76] be included on the agenda of the twenty-eighth session of the General Assembly. The letter was accompanied by a draft resolution proposing the substitution of a RGNUC's delegation for the delegation of the Khmer Republic in the General Assembly.[77] The General Assembly was thus faced with two rival claimants each purporting to be the legitimate representative of a Member State.

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cided to defer a decision on the regularity of the Hungarian credentials. Pursuant to Rule 29 of the General Assembly's Rules of Procedure the representatives of the Hungarian government continued to participate in the work of the Assembly on a provisional basis. *See* U.N. GAOR, 17th Sess., 1202d plen. mtg., Agenda Item 3, U.N. Doc. A/PV.1202 (1961); U.N. GAOR, 15th Sess., 995th plen. mtg., Agenda Item 3, at 498-504, U.N. Doc. A/PV.995 (1960); U.N. GAOR, 14th Sess., 852d plen. mtg., Agenda Item 3, at 710-14, U.N. Doc. A/PV.852 (1959); U.N. GAOR, 13th Sess., 792d plen. mtg., Agenda Item 3, at 608-14, U.N. Doc. A/PV.792 (1958); U.N. GAOR, 12th Sess., 726th plen. mtg., Agenda Item 3, at 561-77, U.N. Doc. A/PV.726 at 561 (1957); U.N. GAOR, 11th Sess., 658th plen. mtg., Agenda Item 3, at 1186, U.N. Doc. A/PV.658 at 1186 (1957). While the Hungarian case deviates from common practice, the result in this case, as well as in all above-mentioned cases, was that a government that came into being in a radical fashion was accepted as the legitimate authority representing the State. This includes a government which owed its being to foreign military intervention but against which there was no internal challenge.

73. *See supra* note 30.

74. *Id.*

75. *Id.*

76. *Letter Dated 8 Oct. 1973 from Members . . . to the Secretary-General,* U.N. GAOR, 28th Sess., Annexes, Agenda Item 106, addendum pt. 1, U.N. Doc. A/9195 (1978).

77. *Id.*

This was not the first time in the history of the United Nations that an internal challenge to representation was raised. Indeed, the question of representation in a somewhat subtler form, had come up already before the League of Nations.[78] But was the practice engaged in by the United Nations consistent enough to allow for a prediction on the decision the General Assembly would make? Was it possible to discern a pattern in that practice?

The international organization's practice regarding representation began with the 1935 Italian invasion and consequent annexation of Ethiopia, a fellow-member of the League of Nations.[79] When the Credentials Committee of the League of Nations met, it expressed its doubt as to the order of the credentials issued by Haile Selassie, the Emperor of Ethiopia, noting that he was no longer the effective authority in control of the State, that his government was not in the capital and that, at the time he had issued the credentials to his delegates, he was residing in another country.[80] Nevertheless, in view of documents stating that the Selassie government functioned in part of the country, the Committee resolved to give the delegation "the benefit of the doubt" and accepted its credentials.[81] The underlying rationale for this decision seems, however, to have emanated from a mixture of guilt and a political desire to condemn the Italian aggression.

The legal grounds for such condemnation had their origins in the Stimson Doctrine, born as a reaction to the 1931 Japanese invasion of Manchuria, and announcing that the United States would not recognize territorial gains achieved in contravention of the 1928 Pact of Paris.[82] The Stimson doctrine was subsequently adopted as a collective policy by the League of Nations and a resolution of the League's Assembly of March 11, 1932, required States not to recognize any "situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris."[83] That resolu-

78. The question which had come before the League of Nations concerned the representation of Ethiopia and is discussed *infra* text accompanying notes 79-87. The reference to the subtler form of challenge stems from the fact that Italy, which had invaded, occupied and annexed Ethiopia, made it known that while it would not challenge the credentials issued by the ousted Emperor, it would nevertheless regard their acceptance as a reason for not sending its own delegates. *See* Hersch Lauterpacht, *The Credentials of the Abyssinian Delegation to the Seventeenth Assembly of the League of Nations*, 18 BRIT. Y.B. INT'L L. 184 (1937).

79. For a description of the League of Nation's actions, see Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT'L L. 614 (1937).

80. *Id.*

81. *See* Lauterpacht, *supra* note 78, at 185 (quoting League of Nations Doc. A.41.1936 (1936)).

82. *See The General Treaty for the Renunciation of War (Kellog-Briand Pact)*, August 27, 1928, 94 L.N.T.S. 57.

83. *See, e.g.*, LEAGUE OF NATIONS O.J. Spec. Supp. 101, at 8; W.W. Willoughby, *Far*

tion was subsequently reiterated in various declarations.[84]

Since the Italian invasion of Ethiopia was clearly in contravention of Article 10 of the Covenant of the League of Nations, as well as of the Pact of Paris, the Italian conquest created a "situation" that was not to be recognized.[85] The absence of any reference to the policy of collective non-recognition of this situation in the decision of the Credentials Committee is quite conspicuous, but it does not follow that the decision was not influenced by that policy. It is quite possible that the Committee refrained from relating to the policy because such a substantive determination was bound to be considered outside the scope of its procedural function. Further, this omission expresses the *Zeitgeist* and the heralding of the meek acceptance of the policy of appeasement that was soon to become the hallmark of the political discourse at that time. In fact, in 1938 the United Kingdom requested that the Secretary-General include on the agenda of the forthcoming session of the League's Council an item pertaining to the situation in Ethiopia due to the anomalous situation created by the fact that five of the members of the Council recognized the sovereignty of Italy over Ethiopia.[86] Later that year Ethiopia withdrew from participating in the proceedings of the Assembly.[87]

Taken from the Cambodian perspective, the Ethiopian precedent seems to have offered Prince Sihanouk some grounds for claiming authority over at least part of the country, despite his and his government's absence from the country and lack of control over the capital. The significance of the Ethiopian precedent is, however, broader, and rests on the following: it initiated the practice whereby the Credentials Committee inquires into the issue of representation and it exposed the tension between substantive questions of policy and procedural matters and the artificiality in the attempt to squeeze the former into the straight-jacket of the latter. Furthermore, while acknowledging the importance of effective control as the relevant test for representation, the decision of the Credentials Committee, in effect, refused to allow brute force to take over principle.[88] However, the Committee did not

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Eastern Policies of the United States, 84 AM. J. INT'L L. Supp., 193, 197 (1940).

84. *Id.*

85. For an analysis of the resolution of the Assembly of the League in the context of collective non-recognition, see JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS, 32-35 (1987).

86. 19 LEAGUE OF NATIONS O.J. 535 (1939). Haile Selassie reacted by requesting to be present in the Council's deliberations indicating that he would transmit the credentials of his delegates in due course and the Council approved this request.

87. 17 LEAGUE OF NATIONS O.J. 658 (1937), *cited in* BENEDETTO CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 56 (1996).

88. *See* CONFORTI, *supra* note 87, at 56.

consider itself competent to thus rationalize its decision.[89] Thus, a dialectical stage was set: will further practice favor the objective or the subjective components of legitimacy? How will the procedural nature of a determination by the Credentials Committee affect this choice? Which direction was preferable in terms of the credibility of the validating organization? It remains for the United Nations to deal with these questions.

The United Nations was confronted for the first time with the need to determine which authority is the legitimate government of a member State in 1950 when the question of Chinese representation arose.[90] This remained a vexing problem until 1971.[91] This case is *sui generis* in many ways ranging from the geopolitical magnitude of China, to its permanent seat in the Security Council, and to the issue of membership.[92] Therefore, its value as a precedent should be construed carefully. The intricate web of political and legal maneuvers with respect to the question of Chinese representation is beyond the scope of this paper and has been discussed extensively elsewhere.[93] For our purposes, three issues were significant with relation to the issue of Chinese representation: 1) the classification of the representation problem; 2) the criteria applied; and 3) the lessons learned insofar as the credibility of the United Nations was concerned.

With regard to classification, the problem was dealt with initially as a procedural matter under the applicable Rules of Procedure of the relevant organs of the United Nations.[94] For a change to be effected, the problem was then classified as an "important question" requiring a two-thirds majority vote of the members present and voting. The problem was then reclassified as an unimportant question.[95] Underlying these classifications and ensuing procedural tactics lay attempts to deal with the issue as a substantive matter and counter-attempts, sponsored

89. As is evidenced in the discrepancy between the rationale and language of its deliberation against its substantive decision. *See supra* note 71.

90. *See generally* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 152-158 (1963); Herbert W. Briggs, *Chinese Representation in the United Nations*, 6 INT'L ORG. 192 (1952); L.C. Green, *Representation Versus Membership: The Chinese Precedent in the United Nations*, 10 CAN. Y.B. INT'L L. 102 (1972); H. Arthur Steiner, *Communist China in the World Community*, 533 INT'L CONCILIATION 389 (1961); Quincy Wright, *The Chinese Recognition Problem*, 49 AM. J. INT'L L. 320 (1955).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* Ciobanu, *supra* note 26, at 362.

95. *See* G.A. Res. 2025 (XX), 20 U.N. GAOR, 20th Sess., Supp. No. 14, at 2, U.N. Doc. A/6014 (1965); G.A. Res. 1668 (XVI), U.N. GAOR,16th Sess., Supp. No. 17, at 66, U.N. Doc. A/5100 (1961).

by the United States, to classify the issue as a procedural matter.[96]

The political clout of the United States was responsible for the failure to recognize the government of the People's Republic of China as "the only legitimate representative of China" until 1971.[97] Significantly, support for this position was steadily, albeit gradually, dissipating, and the argument pertaining to the link between representation and effective government persistently advanced.[98] Indeed, the enormity of the divergence between the reality of the Communist government in China effectively controlling one-fourth of the world population and the symbolic non-validation of this reality by the United Nations could hardly have contributed to the viability of the latter.[99] Viewed from the perspective of the 1973 Cambodian problem, it would appear that while Prince Sihanouk had the Chinese precedent in mind when he requested the inclusion of the issue as a separate item on the agenda of the General Assembly, no doubt wishing to emphasize the subjective aspect of legitimacy, he must have also been mindful of the main lesson to be drawn from the Chinese case: the importance of being earnest in the appreciation of the level of effective control exercised by a claimant authority for the sake of both the people and the United Nations.

The lesson learned from the Chinese representation question was already evident in the 1962 case of Yemen. The facts of this case bore close similarities to the 1973 case of Cambodia. Forces headed by Brigadier El-Sallal and assisted by Egyptian troops overthrew the monarchical government of the Imam.[100] At the time the revolutionary authority issued credentials for its delegates to the General Assembly, the battle on the ground was yet to be concluded: the revolutionary forces were in control of most of the territory, including the capital, and enjoyed the support of large segments of the population.[101] However, the Imam forces, supported by Saudi Arabia, continued to control a small portion of the territory and enjoyed the allegiance of some segments of the population.[102] The Credentials Committee decided, without much ado, to accept the credentials issued by the revolutionary gov-

96. *See Annual Report of the Secretary-General on the Work of the Organization*, 1965-66, U.N. GAOR, XXI, Supp. 1, U.N. Soc. A/6301, at 35-37.

97. G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971). The resolution was then adopted by the Security Council and by the various Specialized Agencies. *See Questions Relating to Asia and the Far East: Representation of China in United Nations*, 1971 U.N. Y.B. 126, U.N. Sales No. E.73.I.1.

98. *Id.*

99. *See, e.g.*, T.M. Franck, *supra* note 7, at 738-39.

100. *See generally* J. CORTADA, THE YEMEN CRISIS (1962). *See also*, Dorfman, *supra* note 35, at 510.

101. *Id.*

102. *Id.*

ernment.[103] This decision indicated a strong, if implicit, preference for the objective component of legitimacy: an authority which controls most of the territory, including the capital, is validated as the representative government of a member State. It is quite conceivable that the decision of the Credentials Committee may have been facilitated by the absence of a formal competing claim by the government of the Imam. However, this could not have been the decisive factor, especially in view of the accepted preference for established governments in inconclusive cases, a preference expressed a mere four years earlier in the case of Iraq.[104] The report of the Credentials Committee, recommending the acceptance of the credentials issued by El-Sallal, was approved by the General Assembly though not without a fairly heated debate pointing, *inter-alia*, to both the subjective component of legitimacy and to the inconclusiveness of the effective control of the revolutionary government.[105]

The Yemen case attested to a further development in the manner in which the Credentials Committee related to the issue of representation: in 1962, the Committee expressed its willingness to lift the veil of credentials to assess the effective control of the authority issuing them, a step it was unwilling to take two years earlier when confronted with rival sets of credentials from the Congo (Leopoldville).[106] That case arose when the then Head of State, Kasa-Vubu, and the then Prime Minister, Lumumba, had mutually ousted each other, shortly after Congo was admitted to the United Nations and before its government was represented in the United Nations. The Security Council was the first organ to be confronted with the rival claimants, each appointing a different delegation and requesting to participate in its proceedings.[107] Having

103. U.N. GAOR, Cred. Comm., 17th Sess., Annexes, Agenda Item 3, at 2, U.N. Doc. A/5392 (1962).

104. In 1958, Iraq was radically transformed from a monarchy into a republic. The new government appointed its delegates to the political organs of the United Nations. Much like in the Yemen case, there was no internal challenge to the credentials issued by the revolutionary government, but the delegates of the old regime continued to participate for several weeks after the issuance of credentials to the delegates of the new government in the sessions of the Security Council of which Iraq was at the time a member. Unlike the Yemen case, the temporal discrepancy between the fact of control and the validation of the government exercising it in the case of Iraq, worked to support the government established prior to the revolutionary change. *See* U.N. SCOR, 13th Sess., 838th mtg., U.N. Doc. S/PV.838 (1958); U.N. SCOR, 13th Sess., 834th mtg., U.N. Doc. S/PV.834 (1958); U.N. SCOR, 13th Sess., 827th mtg., U.N. Doc. S/PV.827 (1958).

105. For the debate, see G.A. Res. 1871, U.N. GAOR, 17th Sess., Supp. No.17, at 1, U.N. Doc A/5217 (1962).

106. *See* U.N. Doc. A/4579 (1960). For a general factual account of the troubled birth of the Congolese Republic, leading eventually to the United Nations Operation in the Congo (ONUC), see THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING, 215-22 (2d ed. 1990).

107. *Statement by the President,* U.N. SCOR, 15th Sess., 899th mtg. at 2, U.N. Doc. S/PV.899 (1960).

rejected a Polish proposal to accept the credentials of the Prime Minister Lumumba, the Security Council did not accept any of the credentials, and did not allow any representative of the Congo to participate in its deliberations.[108]

Thereafter, the General Assembly referred the matter to the Credentials Committee, and the latter, awaiting clarification of the situation, did not report back until mid November 1960.[109] At that time the Credentials Committee recommended that the credentials issued by Kasa-Vubu be accepted.[110] While this postponement indicates that due regard was paid to the effectiveness of the representative authority, the Committee refrained from delivering a substantive assessment of the situation.[111] The Committee also refused to pass judgment on the contention of the Prime Minister that the Kasa-Vubu government was contravening the Congolese constitution, because it did not want its actions to be construed as "an intervention in the domestic affairs of the Congo."[112] The Credentials Committee thus accepted the credentials issued by the Head of State on the formal grounds that they were issued by the primary organ empowered to accredit delegates according to the language of Rule 27 of the Rules of Procedure of the General Assembly.[113] The General Assembly approved the report of the Committee, despite a minority opposition which claimed that, from the point of view of effectiveness, no decision should be taken at the time.[114]

The above analysis thus leads to the following conclusions regarding the practice of the Organization on matters of representation by 1973: first, issues concerning representation were dealt with primarily, though not exclusively, by the Credentials Committee; second, the Committee was increasingly willing to not only assess the representative nature of the authority issuing credentials but to admit that such assessment was undertaken; third, the assessment was made according to the standard of effective control; fourth, while this standard seems susceptible to a fairly objective determination, the credentials process itself remained political. The net result was that whenever the factual situation surrounding the newly formed government either remained, or was presented as inconclusive, the representation determination was

108. *Id.*

109. U.N. GAOR, Cred. Comm., 15th Sess., Annexes, Agenda Item 3, U.N. Doc A/4578 (1960), U.N. Doc A/4579 (1960).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. The minority position, much like the majority position, was politically motivated and the opinions were divided against the great divide of the Cold War. Eventually, the Kasa-Vubu government did establish its effective control over the Congo. G.A. Res. 1498, U.N. GAOR, 15th Sess., Supp. No. 16, vol. I, at 2, U.N. Doc. A/4684 (1960).

made according to the political support each of the rival parties was able to mobilize. In that sense, the legal regime did seem increasingly to be but a transparent robe adorning the muscles of the body-politic.

Nevertheless, practice indicates that the mere existence of a legal regime did impose rules by which the political contest for representation was to be fought. Both parties in the 1973 Cambodian case mastered these rules. RGNUC's request that the matter be considered as a separate item on the agenda of the General Assembly, and the Khmer Republic's preference that the matter be relegated to the Credentials Committee can both be seen as procedural maneuvers designed to enhance the respective positions of the rival claimants. The Khmer Republic preferred a discussion in the Credentials Committee since it stood to benefit from a formal reading of the Rules of Procedure governing the deliberations of the Committee, as well as from the Committee's employment of the effective control test to determine legitimacy. The effective control test consists of the arguments that: 1) the issue of representation is procedural and was determined when the Committee first approved the credentials of its delegation; 2) that any other course would contravene the Rules of Procedure and amount to an intervention in the domestic affairs of the Khmer Republic, a matter clearly beyond the scope or the powers of the Credentials Committee; and 3) that a claimant absent from the capital and the country cannot be said to exercise effective control.[115] These factors all explain why General Lon Nol wanted the issue to be determined by the Credentials Committee and why Prince Sihanouk found it more advantageous to have the General Assembly discuss it.

In the General Assembly, unencumbered by said Rules of Procedure, RGNUC wished to further accentuate the criteria of resolution 396(V) at the expense of the more restrictive application of the effectiveness standard in an attempt to point out that the General Assembly cannot sanction foreign intervention and that to do so would amount to an unacceptable endorsement of an intervention in the domestic affairs of a member State and a reward for foreign aggression.[116]

The General Assembly agreed with RGNUC's request, but decided to postpone its consideration of the matter until its twenty-ninth session.[117] This decision was due to a procedural maneuver by the supporters of Lon Nol, led by the United States, attempting to channel the matter to the Credentials Committee.[118] Not surprisingly, in its report

115. *See* Dorfman, *supra* note 35, at 511-12.

116. *See id.* at 498-99.

117. U.N. GAOR, 28th Sess., 2191st plen. mtg., vol. III, Agenda Item 106, U.N. Doc. A/PV. 2191, at 96 (1973).

118. Pursuant to the Rules of Procedure, the matter was in effect transferred to the Credentials Committee, because it would be considered there as a matter of course at the

of December 12, 1978, the Credentials Committee recommended the acceptance of the credentials issued by the Khmer Republic.[119] The report of the Committee was then approved by the General Assembly.[120] In its twenty-ninth session, the General Assembly decided to wait for the report of the Secretary-General on his efforts to resolve the dispute, and thus did not take any further action on the matter before the submission of the Secretary General's report.[121] This postponement, too, was orchestrated by the Khmer Republic and its supporters, resulting in continued representation of Cambodia in the General Assembly by the delegates of the Khmer Republic.[122]

Civil war continued to ravage the country, and a year later the Government of General Lon Nol was defeated and replaced by a Khmer Rouge government adorned by Prince Sihanouk as its Head.[123] The thirtieth session of the General Assembly accepted the representatives of the new government to the seat of the newly renamed Cambodia, which was soon to be baptized yet again as "Democratic Kampuchea."[124] While the fields of Cambodia were turning into graveyards, the delegates of that government continued to represent Democratic Kampu-

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beginning of the 29th Session.

119. U.N. GAOR, Cred. Comm., 28th Sess., Agenda Item No. 3, Annexes XXVIII, addendum pt. 1, U.N. Doc. A/9179 (1973), *revised in* A/9179/Corr. 1. The debate in the Committee testifies to the importance of mastering the procedural game: supporters of the Khmer Republic argued that the Rules of Procedure confine the Committee to a determination of whether the requirements of Rule 27 have been met, that the representative nature of a government is a domestic matter and that the claim to effective control advanced by RGNUC is defied by its absence from the country. *See id.* at 2-3 for arguments advanced by the US, Japan, Nicaragua, Greece and Uruguay. Supporters of RGNUC (China, Senegal, Tanzania) refrained from relating to the criterion of effectiveness. *Id.* Instead they argued that there is nothing in Rule 27 to prevent the Committee from determining the representative nature of an authority issuing credentials; that the procedural channeling of the matter to the Credentials Committee should obscure neither its substance nor the position of the majority of States favouring RGNUC as is indicated by the initial vote to consider the matter as a separate item on the agenda, and that the Lon Nol government does not represent the people of Cambodia and therefore to allow it to represent them is an intervention in the domestic affairs of Cambodia, a point further underscored by its reliance on foreign troops. *Id.*

120. A motion to amend the report and substitute the credentials of RGNUC for those of the Khmer Republic failed. *See* U.N. GAOR, 28th Sess. 2204th plen. mtg., U.N. Doc. A/PV. 2204, at 76-77 (1973).

121. *See* G.A. Res. 3238 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, Agenda Item 25, at 5, U.N. Doc. A/9631 (1975).

122. This was in accordance with Rule 29 of the Rules of Procedure which provides for the provisional seating of a representative until the General Assembly reaches its decision on the matter. For the text of Rule 29, see *supra* note 12.

123. *See The United Nations and Cambodia 1991-1995, in* 2 THE UNITED NATIONS BLUE BOOK SERIES 5 (1995).

124. G.A. Res. 3367 A &B, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1975).

chea in the General Assembly in an uncontested manner until 1979.[125]

B. *Second Challenge - 1979*

"What's in a Name?", asks Juliet. "That which we call a rose by any other name would smell as sweet."[126] Alas, in the case of Cambodia, a.k.a. the Khmer Republic (1973), a.k.a. Democratic Kampuchea (1974), a.k.a. the People's Republic of Kampuchea (1979), no sweet smell of roses lingered over the killing fields, and in the country which was called by so many names, people were dying in a bloody civil war.

In December 1978, the Khmer Rouge government of Democratic Kampuchea, headed by Pol Pot, was overthrown.[127] Over 100,000 Vietnamese troops, invaded the country and installed a new governing authority, headed by Heng Samrin, under the name "Kampuchean People's Revolutionary Council." The new government took control of the capital and most of the countryside, while the ousted government continued to control a small area near the Thai border.[128] Both the government of Democratic Kampuchea and the Government of the People's Republic of Kampuchea claimed to be the representative authority of the State.[129] Like the case of the Congo,[130] the question as to which of the rival claimants represented Kampuchea was first faced by the Security Council.[131] On January 3, 1979, the representative of Democratic Kampuchea requested that the Security Council hold an urgent meeting on the situation to "condemn the Vietnamese aggression and to take such measures. . .to ensure that Vietnam ceases its aggression and respects the independence, sovereignty and territorial integrity of Democratic Kampuchea."[132] On January 9, 1979, the Permanent Representative of Vietnam transmitted to the President of the Security Council a telegram from Heng Samrin informing him that the Kampuchean People's Revolutionary Council is performing the functions of a government in Kampuchea, that the government of the "Pol Pot clique" had ceased to exist and that therefore meeting with a representative of that pur-

125. As evidenced by the Reports of the Credentials Committee between the 30th and 34th sessions, see U.N.GAOR, 33rd Sess., Annexes, Agenda Item 3, U.N. Doc. A/33/350 and U.N. Doc. A/33/Add.1 (1978/1979); U.N. GAOR, 32nd Sess., Annexes, Agenda Item 3, U.N. Doc. A/32/336 and U.N. Doc. A/32/Add.1 (1977); U.N. GAOR 31st Sess., Annexes, Agenda Item 3, U.N. Doc. A/31/308 and U.N. Doc. A/31/Add.1 (1976); and U.N. GAOR, 30th Sess., Annexes, Agenda Item 3, U.N. Doc. A/10270 and Add.1 (1975).

126. WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act II, sc. 1.

127. FREDERIC L. KIRGIS, INTERNATIONAL ORGANIZATIONS, 181ff. (1993); C. Warbrick, *Kampuchea: Representation and Recognition*, 30 INT'L COMP. L.Q. 234, 234 (1981).

128. *Id.*

129. *Id.*

130. *See supra* text accompanying notes 106-114.

131. U.N. SCOR, 34th Sess., Supp., Jan.-Mar. 1979, U.N. Doc. S/13003 (1979).

132. *Id.*

ported government is a "flagrant intervention in the political affairs of the Kampuchean people and a violation of the principles of the Charter."[133] Pursuant to Article 31 of the Charter, the delegates of both claimants requested to participate in the debate in the Security Council.[134]

The Security Council concerned itself first with the determination of the agenda and then with the question of representation.[135] Predictably, the representatives of the Soviet Union and of Czechoslovakia argued that the item should be deleted from the agenda as its inclusion was requested by a regime no longer in control of the state.[136] To do otherwise, it was contended, would be an intervention in the domestic affairs of the People's Republic of Kampuchea.[137] Equally predictable was the position held by China that: 1) a foreign armed aggression by Vietnam against Democratic Kampuchea is not a matter of internal affairs, but one which requires the intervention of the Security Council; and 2) the temporary setback suffered by the government of Democratic Kampuchea due to foreign aggression has no effect on its legal status, and as the representative of that government, was duly accredited to the General Assembly during its thirty-third session, he retains this status.[138] The agenda was adopted without a vote and the Security Council turned to debate the question of representation under Rule 37 of its Provisional Rules of Procedure.[139]

In this context, and pursuant to Rule 15 of its Provisional Rules of Procedure, the Security Council requested that the Secretary General report on the credentials of the two delegations.[140] The Secretary-General's report stated that the credentials issued by the government of Democratic Kampuchea were considered to be in order as they had been approved by the General Assembly at its thirty-third session.[141] The Security Council approved this report without a vote and invited the delegate of Democratic Kampuchea to participate in its discussion.[142] In the resumed session of the General Assembly, the credentials of the delegate of Democratic Kampuchea were not formally challenged and

133. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, at 1, U.N. Doc. S/13013 (1979).

134. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13019 (1979). *See also* U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13021 (1979).

135. U.N. SCOR, 34th Sess., 2108th mtg., U.N. Doc. S/PV.2108-2112 (1979).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13021 (1979). *See also* G.A. Res. 33/9 A, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/33/350, which approved the report of the Credentials Committee. U.N. GAOR, 33d Sess., Annexes, Agenda Item 3, U.N. Doc. A/33/50/Rev.1 (1978).

141. *Id.*

142. *Id.*

consequently he continued to represent the State in the General Assembly. Several States, however, reserved their position on the question of Kampuchea's representation.[143] This matter was bound to emerge as a major issue in the thirty-fourth session of the General Assembly.

The United Nations was thus caught between the hammer and the anvil. Recognizing Heng Samrin's government meant the application of the test of effectiveness, while at the same time, legitimizing the result of a continuous armed intervention. Conversely, recognizing the Pol Pot government meant defying the test of reality, and at the same time legitimizing a regime which by all accounts was unworthy of recognition. In this case, the choice between principle and expediency was not tantamount to a choice between good and evil but between two evils.

When the thirty-fourth session of the General Assembly opened officially on September 18, 1979, the seat of Kampuchea was indicated by a plate marked "Democratic Kampuchea" and on it sat the representative of that government.[144] However, the government of the People's Republic of Kampuchea also issued credentials to a delegation headed by its Minister of Foreign Affairs, Hun Sen and, at the request of the Permanent Representative of Vietnam, the issuance of these credentials was circulated as an official document of the General Assembly under item 3 of its Provisional Agenda referring to credentials of representatives to the thirty fourth session.[145] It was thus clear that the new government was planning to base its claim on the legal test of effectiveness. Indeed, at the end of the second plenary meeting of the General Assembly, the representative of Vietnam requested that the General Assembly "refuse to authorize the Pol Pot . . .clique illegally to occupy Kampuchea's seat in this Assembly and immediately restore the seat to the People's Revolutionary Council of Kampuchea."[146] Having been presented with a challenge, the President of the General Assembly, acting under Rule 29 of the Rules of Procedure, referred the matter to the Credentials Committee, asking it to report back to the Assembly on September 21, 1979.[147]

The Credentials Committee met and reported back recommending the acceptance of the credentials issued by Democratic Kampuchea.[148] Viewed from the perspective of both the legal regime and its own practice, this decision is surprising as it clearly does not reflect the principle of effectiveness. The minority view in the Committee, argued the case of

143. *Id.*

144. U.N. GAOR, 34th Sess., U.N. Doc. A/34/472 (1979).

145. *Id.*

146. U.N. GAOR, 34th Sess, 2d plen. mtg., at 6, U.N. Doc. A/34/PV.2 (1979).

147. *Id.*

148. U.N. GAOR, 34th Sess., Annexes, Agenda Item 3, U.N. Doc. A/34/500 (1979). The recommendation was reached by a vote of 6 to 3. *Id.*

Heng Samrin's government on the legal ground of effective control.[149] The majority retorted that that government's very existence was a violation of law, that as a matter of principle aggression should not be rewarded; and that delegates of a government already accredited continue to be accredited in subsequent sessions, even if the government is no longer effective, until a "superior claim" is advanced by another government, and a claim by a puppet government is by no means superior.[150]

When the General Assembly met to consider the matter, it had before it three texts: the draft resolution of the Credentials Committee; a new proposal sponsored by Bulgaria and other Socialist States whereby the Assembly was to disregard the report and invite the representatives of the People's Republic of Kampuchea to take their seat as representatives of the legitimate government of that country;[151] and an amendment to the draft resolution of the Credentials Committee, proposed by India and several African States, proposing that the General Assembly suspend its consideration of the report.[152] The effect of this proposal would have been to leave the Kampuchean seat vacant,[153] a solution which had a great appeal to states which were reluctant to regard as legitimate either claimant.[154]

The appeal of the Indian proposal was enhanced by the fact that it was advanced in the form of an amendment.[155] According to Rules 90 and 91 of the Rules of Procedure of the General Assembly, an amendment is to be voted on prior to a vote on the text proposed to be

149. U.N. GAOR, 34th Sess., 4th plen. mtg., U.N. Doc. A/34/PV.4 (1979).

150. This was the argument of the United States. *See id.* For the report of the Credentials Committee of 20 September 1979, see U.N. GAOR, 34th Sess., Annexes, Agenda Item 3, U.N. Doc. A/34/500 (1979).

151. U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.2 (1979).

152. The Indian proposal was designed to leave the seat of Kampuchea vacant, a result achieved a couple of weeks prior to the opening session of the General Assembly, in the sixth summit conference of the non-aligned group held in Cuba. There, Cuba proposed that the delegation of Pol Pot would be expelled and the delegation of Heng Samrin invited instead. Some other States, mainly from South-East Asia, refused to recognize a government which came to power - and held its power - as a result of foreign aggression. The conference settled on a compromise solution whereby until a report of a special committee was submitted to the 1981 scheduled meeting of the Foreign Ministers of the non-aligned group, Kampuchea's seat will remain vacant. This solution was accepted precisely because states felt uncomfortable protecting, in the name of principle, an unprincipled regime as the government of Pol Pot had been. For the text of the Indian proposal, see U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.3 (1979); *see also* U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.3/Add.1 (1979).

153. *Id.*

154. *Id.*

155. U.N. GAOR, 34th Sess., 4th plen. mtg., Agenda Items 3 and 8, at 101, U.N. Doc. A/34/PV.4 (1979).

amended.[156] This order of voting is often considered to be advantageous to the amendment, and South East Asian States, insisting on the need to delegitimize power seized as a result of armed aggression, feared that an outcome that would fall short of this delegitimization would be secure.[157] Thus, the South East Asian States resorted to a procedural maneuver designed to ensure that the text of the Credentials Committee would be voted upon first. They proposed that the Legal Counsel render an opinion as to whether the Indian proposal is indeed an amendment.[158] This proposal was contested, put to a vote and approved.[159] The Legal Counsel opined that past practice of the General Assembly indicates that its understanding of what constitutes an amendment is quite flexible and that, therefore, regarding the Indian proposal as an amendment falls well within that practice.[160]

Nevertheless, a proposal may be considered an amendment if it adds to, deletes from, or revises part of a proposal, but not when it advances a new proposal.[161] In this sense, the Indian proposition constituted in fact a new proposal.[162] The General Assembly then voted to consider the Indian amendment as a new proposal, whereupon the Indian representative moved to propose that the Indian proposal be given priority over other proposals in the voting.[163] At this stage the Bulgarian representative removed his proposal, and the Assembly proceeded to reject the Indian motion to prioritize its proposal and approved the draft resolution of the Credentials Committee.[164]

From the 1979 resolution until 1989, the General Assembly continued to ignore the representative nature of the government of the People's Republic of Kampuchea, which was eventually led by Prime Minister Hun Sen, and to accept the credentials of the delegates of Democratic Kampuchea.[165] Each time the credentials of the delegates of Democratic Kamupchea were challenged, the President of the General Assembly referred the matter to the Credentials Committee.[166]

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156. *Id.*

157. *See* Warbrick, *supra* note 127, at 240. *See also supra* note 152.

158. *Id.*

159. *Id.*

160. *See* Warbrick, *supra* note 127, at 240. *See also supra* note 152.

161. *Id.*

162. *Id.*

163. G.A. Res. 34/2, 34th Sess., U.N. GAOR, Supp. No. 46, at 12, U.N. Doc. A/34/46 (1979).

164. *Id.*

165. Democratic Kampuchea had evolved into a coalition comprising the Khmer Rouge led by Pol Pot, a neutral faction led by Prince Sihanouk, and a noncommunist faction led by Son Sann. *See* KIRGIS, *supra* note 127, at 183.

166. *See, e.g.*, U.N. GAOR, 44th Sess., U.N. Doc. A/44/PV.32 (1989); U.N. GAOR, 43d Sess., U.N. Doc. A/43/PV.33 (1988); U.N. GAOR, 42d Sess., U.N. Doc. A/42/PV.36 (1987); U.N. GAOR, 39th Sess., U.N. Doc. A/38/PV.32 (1984); U.N. GAOR, 37th Sess., U.N. Doc.

The Committee considered the credentials in connection with other credentials, and recommended their acceptance. In each session of the General Assembly, an amendment was moved to approve the Committee's report "except with regard to the credentials of Democratic Kampuchea." Each time this amendment was rejected.[167]

The United Nations thus refused to recognize a government imposed from outside and sustained by the presence of foreign troops, but exercised effective control over most of the country, and did validate a government which operated from outside the territory of the country and had little to recommend in terms of the subjective aspect of legitimacy. This result deviated from the legal prescription as well as from past practice and further failed to secure the supremacy of principle over politics or the viability of the United Nations. It is true that in the case of Ethiopia, a similar determination was made to accept the credentials of a government that was no longer exercising effective control over the country, but that decision was grounded in considerations of principle, law, and morality, that were mostly absent from the case of Cambodia.[168]

Other governments installed as a result of armed intervention in the affairs of member States have been recognized as representative, and their credentials accepted.[169] Thus, it was difficult to justify the decision not to recognize the credentials of Democratic Kampuchea on the grounds of a new rule whereby a government thus installed is denied recognition. It was further quite problematic to base the legitimacy accorded to a government headed by Pol Pot on moral grounds, and indeed no such attempt was ever made.[170] Finally, the continued recognition of the representative status of the government of Democratic Kampuchea indicates that the test of effectiveness which has been hitherto favoured by both rule and practice, and to the application of which the Credentials Committee was ostensibly confined, was discarded.

Viewed from the perspective of the legal regime, the inescapable conclusion from all this is that only the proviso of the criteria for determination incorporated in resolution 396(V), providing that questions of representation shall be considered in the light of "the circumstances

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A/37/PV.43 (1982); U.N. GAOR, 37th Sess., U.N. Doc. A/37/PV.42 (1982).

167. *Id.*

168. *See supra* text accompanying notes 78-87.

169. One example is the government of Afghanistan installed by the Soviet Union in 1980. For the report of the Credentials Committee see U.N. GAOR, 35th Sess., Annexes, Agenda Item 3, U.N. Doc. A/35/484 (1980); *Id.* at addendum pt. 1; *Id.* at addendum pt. 2.

170. During Pol Pot's regime approximately 1 million Cambodians perished. *See The United Nations and Cambodia 1991-1995, in* 2 THE UNITED NATIONS BLUE BOOK SERIES, *supra* note 123, at 5.

of each case," could serve as a basis for the decision regarding representation.[171] This basis is quite obviously political, not legal. The net result of the previously mentioned representation problems was that the United Nations could claim neither a legal, nor a moral, nor a political victory. It was thus hardly surprising that a gap was created between the validating process in the United Nations, the real world, and the ability of the United Nations to function effectively in this world.[172] Consequently, the United Nations' own claim to legitimacy, in conferring legitimacy on governments, was damaged.

C. *Third Challenge - 1997*

The government of Hun Sen, supported by the military presence of Vietnam, continued to control Cambodia for a decade.[173] Throughout this period, the delegation of the coalition of the three opposition factions headed by Pol Pot, Prince Sihanouk and Son Sann, continued to represent Cambodia in the General Assembly.[174] In 1989, the Vietnamese announced their withdrawal from Cambodia.[175] In 1990, a framework for a political settlement in Cambodia was agreed upon between the permanent members of the Security Council and the rival Cambodian parties.[176] A Supreme National Council, consisting of said parties, was formed pursuant to this settlement.[177] The main function of the Supreme National Council was to lead the country to free elections, with the support of the United Nations.[178] That year the Supreme National Council could not agree on the composition of Cambodia's delegation to the United Nations and consequently the Cambodian seat in the General Assembly remained vacant.[179] A year later, the Supreme National Council agreed that Prince Sihanouk would lead the Cambodian delegation.[180]

The United Nations' intensive engagement in the peace efforts in Cambodia began in earnest with the 1991 Paris Peace Agreement.[181]

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171. G.A. Res. 396(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 24-25, U.N. Doc. A/1775 (1950).

172. All relief and humanitarian activities the United Nations wished to undertake in Cambodia required negotiation with the government it did not validate, but whose goodwill and assistance were required. *See generally* Franck, *supra* note 7 (discussing the circumstances surrounding nation-states compliance with international law).

173. KIRGIS, *supra* note 127, at 184.

174. *Id.*

175. *Id.*

176. *Id.*

177. KIRGIS, *supra* note 127, at 184.

178. *Id.*

179. *Id.*

180. *Id.*

181. U.N. GAOR, 48th Sess., Supp. No. 1, at 50, U.N. Doc. A/48/1 (1993).

By 1992, the four parties had delegated to the United Nations all necessary powers to implement the accord.[182] The resulting peace-keeping operation, the United Nations Transitional Authority in Cambodia (UNTAC), faced a formidable task: rebuilding the torn country on democratic underpinnings. The civilian facet of UNTAC's mandate called for promoting human rights, organizing and conducting free and fair elections, maintaining law and order, overseeing civil administration, repatriating refugees and rehabilitating essential infrastructure.[183] In addition to these civilian functions, UNTAC had military tasks ranging from the supervision of the cease-fire to the demobilization and disarming of over 200,000 armed forces and militia.[184] In May 1993, 90% of the electorate went to the polling booths to elect a government, and UNTAC became the jewel in the crown of United Nations peace-keeping operations.[185]

The elections resulted in the formation of a fragile coalition government, led by Prince Ranariddh, son of Sihanouk, who won the elections, as First Prime Minister, and by Hun Sen, who had enough real power to threaten the result of the elections, as Second Prime Minister.[186] It was a moment where a glimmer of hope seemed to have lightened the Cambodian nightmare. This was not to last long. On July 5, 1997, the Cambodian four-year flirt with democracy ended when the Second Prime Minister launched a successful coup d'etat against Prince Ranariddh, and replaced him as First Prime Minister with Mr. Ung Huot.[187] This action was endorsed by the Cambodian National Assem-

182. *Id.* at 51.

183. *Id.* at 50.

184. *See* Annex 1 of the 1991 Paris Peace Agreement, *reproduced in The United Nations and Cambodia 1991-1995, in* THE UNITED NATIONS BLUE BOOK, *supra* note 123, at 133.

185. At its height, by mid-1992, UNTAC numbered 21,000 military, police and civilian personnel. *Id.*

186. The internal Cambodian politics leading to what some observers have termed to be an inescapable consequence of a Siamese - twin government are beyond the scope of this paper. Suffice to note that the power-sharing formula whereby the Prince had political seniority, but Hun Sen remained with real power, did not augur well for the nascent democracy. Instability generated by the disintegration of the Khmer Rouge, and the first Prime Minister's negotiations with them as well as with Hun Sen's most vehement critic and opposition leader, Sam Rainsy, reached its critical point when Hun Sen decided to act in early July 1997. *See A Coup in Cambodia*, ECONOMIST, July 12, 1997, at 33; Anthony. Speath et al., *Haunted By Ghosts: A Coup Brings the Black Night of Despair Back to Tortured Cambodia*, TIME, July 21, 1997, at 48. On August 6, 1997, the Cambodian National Assembly voted to strip Prince Ranarridh of his parliamentary immunity and to elect Foreign Minister Ung Huot as the new First Prime Minister. The constitutionality of these proceedings is questionable under the Cambodian Constitution, but this is a matter that since the Congo precedent has been deemed irrelevant to a decision by the United Nations as regards matters of representation. *A Coup in Cambodia, supra.*

187. *See Press Conference by Prince Ranariddh of Cambodia*, PC/1997/09/17 (1997) [hereinafter *Ranariddh Conference*].

bly.[188] Soon thereafter the United Nations was faced yet again with the question of Cambodian representation.

When the Credentials Committee met on September 17, 1997, it had before it two sets of credentials for two delegations to represent the Royal Government of Cambodia at the fifty-second session of the General Assembly.[189] One set of credentials was signed on September 2 by King Sihanouk, the Head of State, presenting a delegation headed by the new First Prime Minister and Minister of Foreign Affairs and International Cooperation, Ung Huot. The other set of credentials was signed on August 25 by the exiled Prince Ranarridh and presenting a delegation headed by himself as First Prime Minister.[190] To complicate matters still, in a letter dated September 5, 1997 from King Norodom Sihanouk to the Representative of his son, Prince Norodom Ranarridh, the King stated that he continued to recognize the Prince as the legal First Prime Minister of Cambodia.[191]

Prior to the meeting of the Credentials Committee, and throughout most of July, August and early September, 1997, the respective positions of the parties were presented to the Security Council, to other Permanent Missions, to the United Nations, and to the Press.[192] These positions rested on familiar grounds, fertilizing the political soil with factual and legal seeds. Prince Ranarridh, in exile, based his position against the legitimacy of the new government in Phnom Penh on several related arguments all pertaining to the subjective component of legitimacy. Prince Ranarridh emphasized that the government of which he was First Prime Minister was "born of free and fair elections organized and supervised by the United Nations" that was brought down by a "violent coup d'etat," and that "no elected government official anywhere on earth should be brought down by the force of arms."[193] Prince Ranarridh further stressed that Hun Sen's "bloody seizure of power is an affront to democracy and a flagrant violation of the 1991 Paris Peace Agreement." Urging the United Nations to withhold recognition from the "new puppet First Prime Minister," he stressed that the matter

188. *Id.*

189. *See Report of the Credentials Committee*, U.N. GAOR, 52nd Sess., at 4, U.N. Doc. A/52/719 (1997).

190. *Id.*

191. The King, the acknowledged symbol of unity in Cambodia, seems to have recognized Ung Huot as the *de facto* First Prime Minister, but continued to refer to his son as the legal First Prime Minister. *See, e.g., Ranariddh Conference, supra* note 187; *Press Conference by Cambodia*, PC/1997/09/12 (1997) [hereinafter *Cambodia Conference*]. In these communications, it is contended that the King was not exercising free choice when he signed the letters of credence at the request of Hun Sen.

192. U.N. GAOR, 51st Sess., at 2-3, U.N. Doc. SPRST/1997/37 (1997).

193. *Id.*

cannot be seen as "an internal affair of the Cambodian people."[194]

It was argued that the coup was but a violent indication of Hun Sen's fears of being implicated in drug and terrorist activities, the trial of Pol Pot, and, most importantly, losing the elections scheduled for May 1998 in a free and fair political contest.[195] All these arguments stressed the connection between the democratically elected government of which the Prince was First Prime Minister, and the role of the international community, acting through the United Nations, in bringing about a democratically elected government at great financial cost and human sacrifice.[196] If the United Nations were now to recognize the legitimacy of Hun Sen's government, all this effort would have come to naught and would be regarded as a waste since the United Nations could have done so long ago.[197] The refusal of the United Nations to recognize Hun Sen's government, even prior to the 1993 elections, further supports the argument against legitimizing it now.

The contest for representation was taking place within the Cambodian Permanent Mission itself when the new government recalled the Permanent Representative of Cambodia, Prince Sisowath Sirirath home, and handed over the leadership of the Mission to his Deputy, Ambassador Ouch.[198] From a constitutional perspective, Prince Sirirath claimed that as he was appointed to his position as Permanent Representative by both the First and the Second Prime Ministers, he could not be recalled without the approval of the First Prime Minister,

194. *Id.* In this case also, the Security Council was the first organ to be faced with the question of Cambodian representation. The quotes in the text are taken from a letter dated July 18, 1997, from Prince Ranariddh to the President of the Security Council and transmitted a day later by Ambassador Sirirath, Cambodia's Permanent Representative to the United Nations. The Prince was received by the President of the Security Council on July 10. For the presidential statement issued by the President of the Security Council, see *id.*

195. U.N. GAOR, 51st Sess., at 2-3, U.N. Doc. SPRST/1997/37 (1997).

196. *Id.*

197. *Id.*

198. The situation with the Permanent Mission of Cambodia to the United Nations was itself torn between the rival claimants: on August 2, all Permanent Representatives and Observers received a letter whereby they had been informed by Ambassador Ouch Borith, formerly the Deputy to the Permanent Representative, Sisowath Sirirath, that the latter had been recalled from his post as Ambassador Extraordinary and Plenipotentiary and as Permanent Representative. On August 4, they received a letter from Ambassador Sirirath, notifying them that the letter of August 2 was false, that his previous Deputy, Ambassador Ouch, had been relieved of his duties, having supported the coup and that he, Prince Sirirath, remains the legal Permanent Representative of the only legal first Prime Minister. Attached to this letter was a letter from Prince Ranariddh, dated July 24, and addressed to the Secretary-General, confirming Ambassador's Sirirath's position on the basis of the unconstitutionality of the coup. The letter is referenced as RC/MP/0483/97; *see also Cambodia Conference*, *supra* note 191.

Prince Ranariddh.[199] On July 21, the Permanent Mission of the Kingdom of Cambodia sent to all Permanent Representatives and Permanent Observers of the United Nations an appeal to refrain from recognizing the legitimacy of Ambassador Ouch, claiming that his appointment was but an illegal reward for having supported a "bloody Coup d'etat."[200] On the same day, in a letter addressed to the Secretary-General and requesting that it be circulated as an official document under agenda items 109 and 110 of the fifty-first session of the General Assembly and of the Security Council, Prince Ranarridh rather pointed out that the situation in Cambodia is now characterized by "endless crimes of political harassment, intimidation and threat," and requested that an investigation into these charges be conducted by the Secretary-General's Special Representative on Human Rights in Cambodia.[201] This position was taken, *inter-alia*, to delegitimize both the claim of effective control and of the constitutionality of the actions undertaken by the new government.[202] The request that the issue be dealt with as a substantive issue in the Security Council and the General Assembly under items pertaining to self-determination and human rights indicate that Prince Ranarridh was preparing to ground his claim - and to counterattack the claim of his rival to be recognized as the legitimate representative of Cambodia - on the subjective element of legitimacy.

The position taken by Hun Sen was equally predictable, and emphasized the constitutionality of his government and its continuity, both internally and internationally, within the democratic framework.[203] Hun Sen explained that what happened on July 5 was "sudden events," and not a coup. Hun Sen further claimed that these events were a direct result of provocation on the part of Prince Ranariddh whose forces shelled the capital and necessitated a counter attack by the government,[204] and the government's action was "a necessary measure to solve the anarchy by the Ranariddh group."[205] The Prince, it was stated, was acting as a war-lord rather than as a Prime Minister, was collaborating with Khmer Rouge forces despite the fact that the government was still fighting them; was building up armed forces loyal to him - not to the government; and was engaged in the illegal importation of weapons to arm his new soldiers. It follows that the govern-

199. *Id.*

200. *Id.*

201. U.N. GAOR, 51st Sess, U.N. Doc. A/51/947 (1997). U.N. GAOR, 51st Sess., U.N. Doc. S/1997/570 (1997). Agenda items 109 and 110 of the fifty-first session of the General Assembly refer to the rights of people to self determination and human rights questions.

202. *See supra* note 199.

203. *See Press Conference by Deputy Permanent Representative of Cambodia*, PC/1997/08/19 (1997) [hereinafter *Deputy Conference 1*].

204. *Id.*

205. *Id.*

ment's success "liberated the people from the danger of returning to the Khmer Rouge's genocidal regime and paved the way for fair and free elections on May 28, 1998."[206]

Indeed, the government in Cambodia was not new: it was a continuation of the coalition of Cambodia, the outcome of the 1993 elections.[207] The change in some functionaries was but "some small reshuffling of the government," quite common in most democratic governments.[208] The constitutionality of the government was further confirmed when the National Assembly of Cambodia, decided in a "democratic, free and sovereign vote," to replace Prince Ranariddh with Ung Huot as First Prime Minister.[209] The Royal Decree of August 7, which finalized the decision of the National Assembly, and was signed by the acting Head of State who had been granted full powers to do so by the Head of State, King Norodom Sihanouk, was equally valid.[210] Thus, despite the King's non-recognition of the legality of the new first Prime Minister, it was nevertheless maintained that while the King was free to hold his own opinion, that opinion lacked legal merits in view of the above-mentioned delegation of powers to the acting Head of State.[211]

Referring specifically to the representation of Cambodia in the United Nations, it was further claimed that both the recalling home of Ambassador Sirirath, and the nomination of a new Permanent Representative were perfectly within the power of the First Prime Minister, Ung Huot.[212] The problems faced by the Cambodian Permanent Mission were thus a result of an "open rebellion" against the government by the former Permanent Representative who further defied the action of the acting Head of State to terminate his mission and return to Phnom Penh.[213] The international community should remember that while Cambodia has two Prime Ministers, it has only one government. That Government is "located in Phnom Penh, not in Aix-en-Provence, France,"[214] and is recognized by 185 member States.[215] Refusing to recognize the delegation, the government accredited would thus be "an unacceptable interference in the internal affairs of Cambodia."[216]

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206. *Id.*

207. *See Press Conference by Deputy Permanent Representative of Cambodia*, PC/1997/09/18 (1997) [hereinafter *Deputy Conference 2*].

208. *Id.*

209. *Id.*

210. *Id.*

211. *See Deputy Conference 1, supra* note 203.

212. *See Deputy Conference 2, supra* note 207.

213. *Id.*

214. *Id.*

215. *Id.*

216. *See Deputy Conference 2, supra* note 207.

Insofar as Cambodia's international relations are concerned, the government pointed out that it continues to be recognized by all member States, and maintains diplomatic relations with them. In addition, embassies, non-governmental organizations and United Nations programmes and funds such as UNDP and UNICEF, all continue to function normally in Cambodia, and the government continues to exercise effective control over the country and to abide by its international obligations in full respect of the Paris Peace Agreement and the outcome of the UN sponsored 1993 elections. Finally, the government reiterated its commitment to the 1998 elections and welcomed the United Nations as the coordinator of election-observers.[217] The implication of these arguments was that the withholding of validation of the government would have its symbolic effect collide with reality much to the detriment of the validating United Nations.

Before the issue of representation of Cambodia reached the Credentials Committee, the United Nations faced an embarrassing possibility: a show of force between the two rival delegations at the closing ceremony of the fifty-first session of the General Assembly, scheduled for September 15, 1997. Prince Sirirath was the currently accredited Permanent Representative of Cambodia to the United Nations, but the authority purporting to be the only government of Cambodia had recalled him back to Phnom Penh, a recall he claimed was lacking legal validity.[218] At the same time, Ung Huot, as the Cambodian Minister for Foreign Affairs and International Cooperation, was accredited as the Head of the Cambodian Delegation to the fifty-first session.[219] An appeal made by the President of the General Assembly to both parties yielded a compromise solution whereby neither was to attend the ceremony and both would await the resolution of the question by the Credentials Committee.[220]

The Credentials Committee met to consider the credentials of Cambodia on September 17, 1997. In light of past practice it could have followed various roads leading to different destinations. If the Committee took a technical stand, it could have accepted the credentials signed by King Sihanouk as Head of State. According to rule 27 of the Rules of Procedure of the General Assembly, the credentials of representatives

217. *Id.*

218. *See supra* note 199.

219. For the report of the Credentials Committee, see U.N.GAOR, 51st Sess., Cred. Comm., U.N. Doc. A/51/548 (1996), and *id* at addendum pt. 1. It was approved by the General Assembly in Resolution 51/9. G.A. Res. 51/9, U.N. GAOR, 51st Sess., Agenda Item 3(b), 43rd and 87th plen. mtgs., U.N. Doc. A/51/9 (1996).

220. *See Cambodia Conference, supra* note 191. Prince Sirirath stated that he agreed to the compromise out of respect for the President of the General Assembly but that his absence should not be construed as relinquishment on his part of his claim to be the Permanent Representative of Cambodia. *Id.*

can be issued either by the Head of State or Government, or by the Minister for Foreign Affairs.[221] The rule is silent on the relative worth of each in cases of competing claims, and this means that they are equal in value. Nevertheless, past practice indicates that the balance would have been tipped in favor of the credentials issued by the King. For example, in the case of the Congo, the Committee refrained from inquiring into the constitutionality of the letters of credence claiming that to have done so would have been an intervention in the domestic affairs of the Congo, and finally accepted the credentials issued by the Head of State and not the Prime Minister. The Committee based its decision on the formal grounds that the credentials were issued by the primary organ empowered to accredit delegates according to the language of rule 27.[222]

Another argument in support of accepting the credentials issued by the Head of State is based on the legal principle that a later document supersedes an earlier one, and because the letters of credence issued by the Prime Minister were dated August 25, 1997, whereas those signed by the Head of State were dated September 2, 1997, the latter supersedes the former. The same result could have been achieved on the basis of the test of effective control, as by that time it was clear that Hun Sen's government was in control of the country, and enjoyed the obedience of the population.[223]

Conversely, the Committee could have determined, without an inquiry into the Cambodian Constitution, that the letter, dated September 5, from King Sihanouk nullified the validity of his letter of credence of September 2, and indicated that the letter of credence was signed under some form of duress. The same result could have been achieved if the Committee followed the spirit, if not letter, of its decision regarding the representation of Democratic Kampuchea. In the present case there was no foreign intervention, but the government of Hun Sen and Ung Huot existed by virtue of a violent coup, and as a matter of principle, a government, the very existence of which is a testimony to a violation of the democratic framework achieved at great cost to the international community, should not be rewarded. This was the position of the United States, a position quite contrary to its insistence on the technical function of the Credentials Committee in the first round of the Cambodian representation question.[224]

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221. *See supra* note 1.

222. *See supra* text accompanying notes 106-114.

223. *See, e.g.*, B. Crossette, *Cambodian Says He May Bar U.N. From Vote If Denied Seat*, N.Y. TIMES, Oct. 1, 1997, at A10 (clarifying that Hun Sen exercises the effective, though not necessarily legitimate, control in Cambodia, an assessment which the fifteen following months validated).

224. *See* Anthony Goodman, *Cambodia's UN Seat Stays Vacant; Ruling Put Off*, (Sept. 19, 1997) <Reuters@http://www.infoseek.com>. *See also U.S.: Cambodia Should Not Get U.N. Seat*, (Sept. 17, 1997) <http//www.upi.com>.

This inconsistency merely underscores the fact that the legal straightjacket cannot constrain the political nature of the decision. It is true that the argument that an authority which came into power as a result of a violent coup should not be recognized as a legitimate government could have relied on both the second round of the Cambodian representation question and on the precedent of Ethiopia. Nevertheless, there is a crucial difference between these precedents and the 1997 Cambodia round: in the former cases, an armed intervention by a foreign government generated the coup and supported the new authority. This, however, was not the case in the coup undertaken by Hun Sen.

The third route which the Committee could, and indeed did, follow was to defer a decision. The decision not to decide could have been based on the Committee's conception of itself as a technical body which cannot enter into the political determination required and should thus await developments that would allow it to decide otherwise. Such a rationale was used by the Credentials Committee when it first considered the question of Congolese representation.[225] Deferment of decision was also utilized by the Credentials Committee in 1996 when faced with the question of Afghanistan representation.[226] In that case, there were two documents: a formal letter of credence signed by President Rabbani, as he had done the previous year, and a *note verbale* issued by the Ministry of Foreign Affairs in Kabul challenging the credentials issued by President Rabbani, but refraining from submitting alternative credentials.[227] While the Committee could have decided that it was presented with only one set of credentials within the meaning of rule 27, it took a different course, and decided, both in its first meeting of October 23, 1996, and in its subsequent meeting of December 12, 1996, to defer a decision on the credentials of Afghanistan.[228] The effect of the decision

225. *See supra* text accompanying notes 106-114.

226. At the 52nd Session of the Assembly, the Credentials Committee was informed by the Legal Counsel on December 5, 1997 that two communications had been received concerning the credentials of Afghanistan: one was signed by Professor Burhan-u-ddin Rabbani, "President of the Islamic State of Afghanistan," and presented a delegation headed by Dr. A. G. Ravan Farhadi who was identified as "Permanent Representative," and the other was signed by Alhaj Mull Mohammad Rabbani, "Head of the Government of the Islamic State of Afghanistan," and presented a delegation headed by Mr. Abdul Hakeem Mujahid who was identified as "Designate Permanent Representative." The Committee decided to defer a decision on the credentials of Afghanistan "on the understanding that the current representatives of Afghanistan accredited to the United Nations would continue to participate in the work of the General Assembly pursuant to the applicable rules of procedure of the Assembly." *See* U.N. GAOR, 52d. Sess., *supra* note 64, at paras. 9-10 (1997).

227. *Id.*

228. For the report of the Credentials Committee see U.N. GAOR 51st Sess., U.N. Doc. A/51/548 (1996) and *id* at addendum pt. 1. It is interesting to note that, at the first meeting of the Committee, the representative of The Netherlands considered that, "the Government of Afghanistan which had submitted credentials for its representatives at the

was that, pursuant to rule 29 of the Rules of Procedure of the General Assembly, the delegates representing the Rabbani government would continue to represent Afghanistan on a provisional basis.[229]

Other cases that arose between the second and third challenges to Cambodian representation failed to allow for the development of a discernible pattern. Following are a number of examples of this pattern. First, in the case of Somalia, and pursuant to the Security Council's resolution to that effect, the United Nations determined that since there is no government in Somalia, no authority can represent it in the United Nations.[230] Second, in the case of Burundi, despite a condemnation by the Security Council of the overthrow of the legitimate government and the constitutional order in that member State, the representatives of the revolutionary government were allowed to participate without challenge, in the work of the political organs of the United Nations.[231] Third, in the case of Sierra Leone, the Security Council's condemnation, through a series of Presidential Statements, of the military junta which overthrew the elected government of President Kabbah on May 25, 1997, seems to have had no averse effect on the consideration,

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50th Session of the Assembly was still the Government, and that therefore there was no reason not to accept the credentials as presented to the Secretary-General." This view was supported by the representative of the Russian Federation who, however, cautioned that, "although the decisions of the Committee were technical and not political in nature, the situation in Afghanistan was confused and any hasty decision by a United Nations body could be counterproductive." Eventually, the Committee accepted the compromise solution suggested by the Chairman of the Committee that, "on the understanding that the current representatives of Afghanistan could continue to participate fully in the work of the General Assembly," the proposal by the United States representative to defer the Committee's decision regarding the credentials of the representatives of Afghanistan was accepted. The decision of the Committee to defer its decision on the above understanding was approved by the General Assembly in Resolution 51/9 A and B, *id.*

229. *See supra* note 226.

230. *See, e.g.*, S.C. Res. 897, U.N. SCOR, 49th Sess., 3334th mtg., *supra* note 22; *Report of the Secretary General of September 16*, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/715 (1997); *Report of the Secretary General of February 17*, U.N. SCOR, 52d Sess, U.N. Doc. S/1997/135 (1997); *Report of the Secretary General of April 29*, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/325 (1996); *Report of the Secretary General of January 19*, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/42 (1996); *Report of the Secretary General of March 28*, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/231 (1995); *Report of the Secretary General of January 6*, U.N. SCOR, 49th Sess., Supp. for Jan. - Mar., U.N. Doc. S/1994/12 (1994). Note that an absence of government in effect may be understood to mean that a Member State of the United Nations has ceased to qualify for membership inasmuch as Article 4 requires that Members of the United Nations be States and the existence of a government is a *sine qua non* condition for the existence of a State. This issue, however, is beyond the scope of this paper.

231. *See* S.C. Res. 1072, U.N. SCOR, 51st Sess., 3695th mtg., U.N. Doc. S/Res/1072 (1996). The credentials of the representatives of Burundi to the 52nd Session of the General Assembly were examined and accepted by the Credentials Committee at its meeting of 5 December 1997. *See* U.N. GAOR, Cred. Comm., 52d Sess., U.N. Doc. A/52/719, *supra* note 64, at paras. 7 and 11.

and subsequent acceptance, by the Credentials Committee of the credentials of the representatives of Sierra Leone.[232] The Chairman of the Armed Forces Revolutionary Council and Head of State, Major Koroma, notified the Secretary-General of the recall of the Permanent Representative of Sierra Leone, but the credentials of the Permanent Representative were not challenged in the General Assembly, and the communications from Major Koroma were not acted upon.

The Permanent Representative of Cambodia, Prince Sirirath referred to the precedents of both Sierra Leone and Afghanistan to support an outcome he deemed preferable. However, the rationale and circumstances of such precedents were different from the present case of Cambodia where there were two rival sets of credentials, and no condemnation was made by the Security Council.[233]

The effect of the decision to defer the consideration of the Cambodian credentials was that no credentials for any Cambodian representatives have been accepted and thus no one represents Cambodia in the General Assembly.[234] This happened because the Permanent Representative, Prince Sirirath, was previously accredited only to the United Nations, but not to the General Assembly and could not, therefore, rely on the applicability of Rule 29 of the Rules of Procedure of the General Assembly to represent Cambodia on a provisional basis in that organ.[235] The effect of this deferment was thus similar to the result in the case of the Congo, though for different reasons. In the Congo case, there was never any representative previously accredited to the United Nations.[236] Conversely, in the case of Cambodia, the credentials of the previously accredited representative were not specific enough to allow for his pro-

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232. *See, Security Council Calls on Military Junta in Sierra Leone to Take Steps for Unconditional Restoration of Democratically Elected Government*, SC/6408, S/PRST/1997/42 (1997); *Security Council Calls for Immediate and Unconditional Restoration of Constitutional Order in Sierra Leone*, SC/6394, S/PRST/1997/36 (1997); *Security Council Strongly Deplores Attempt to Overthrow Democratically Elected Government in Sierra Leone*, SC/6374, S/PRST/1997/29 (1997). For the decision of the Credentials Committee, see U.N. GAOR, Cred. Comm. 52d Sess., U.N. Doc. A/52/719, supra note 64.

233. *Cambodia Conference*, *supra* note 191.

234. Pursuant to the Organization's practice, if a delegate is not specifically accredited to the General Assembly, s/he cannot continue to represent the government on a provisional basis. *See* 1977 U.N. Jurid. Y.B., U.N. Doc. ST.LEG./SER.C/15, *supra* note 59.

235. Prince Sirirath's participation in the 51st Session was based on his inclusion in the list of the Cambodian delegation to that Session as deputy head of the delegation. *See* the report of the Credentials Committee for the 51st Session of the General Assembly, U.N. Doc. A/51/548, *supra* note 219. *See also id* at addendum pt. 1. Note that in the Tenth Emergency and the Nineteenth Special Sessions of the General Assembly, held in April and June 1997, respectively, it was confirmed that those Permanent Representatives who did not have credentials authorizing them to represent their governments in all sessions of the General Assembly, needed to be specifically accredited to these sessions.

236. *See* text accompanying notes 106-114. *See also* Jhabvala, *supra* note 6, at 622.

visional participation in the General Assembly.[237]

The choice to defer a decision in the case of Cambodia seemed to make eminent political sense: the prime political objective was to facilitate a reconciliation process in Cambodia, and a decision on credentials at this stage might have hampered, rather than facilitated, this objective. Should reconciliation take place, an outcome members of ASEAN and other States were clearly trying to encourage, the door was always open for the rival parties to decide on a combined delegation. Choosing a combined delegation would have allowed Cambodia to be represented in the General Assembly on a provisional basis, pending a reconsideration by the Credentials Committee. Further, the elections, scheduled for May 1998, did provide a time-framework within which a reconciliation process could take place, and the commitment of the Phnom Penh government to free and fair elections supervised by the United Nations could be put to the test.[238]

The political sense of a particular decision, however, still has to reflect a principled process of decision-making in order to provide for a legitimate legal regime. Had such a regime existed, the election process in Cambodia, and perhaps its results, might have been different, and Cambodia would have been represented in the Fifty-second session of the General Assembly.[239] A proposal for the creation of such a regime, institutionalizing the collective legitimization function of the United Nations is made in the final section.

IV. CONCLUDING COMMENTS AND A PROPOSAL: THE FABRIC OF THE PAST AND THE DESIGN FOR THE FUTURE

The discussion thus far leads to the conclusion that neither the legal framework nor the substantive content poured into it by the practice of the United Nations offer clear, consistent and coherent guidance for determining the legitimacy of representative governments in cases where said legitimacy is challenged. This conclusion indicates a state of

237. *See supra* note 235.

238. Cambodia's elections took place on Sunday July 26, 1998 and more than 90 percent of the country's 5.4 million registered voters took part. The voting went smoothly and international election observers reported that it was "almost entirely free of serious irregularities." *See Cambodians Counting Votes Amid Measured Optimism*, N.Y. TIMES, July 28, 1998, at A7.

239. The results of the elections gave the victory to Hun Sen, however, such victory was disputed by the opposition and primarily by Sam Rainsy, who denounced the election as "rife with fraud," though few independent observers shared that view. *See Cambodia's Voters Have Spoken, But Silence Doesn't Reign*, N.Y. TIMES, July 30, 1998, at A9. It should also be noted that no credentials were presented by Cambodia to the Secretary-General for the 53rd Session and thus the Cambodian seat remained vacant during that Session, too.

affairs that needs to be rectified if the United Nations is to play a viable role in conflict-resolution processes emanating from such challenges. Put differently, and responding to the question raised in the introductory section, the current legal regime appears to be but a legal mantle designed to cover the nakedness of the body-politic. Nude Emperors, however, do normally prefer to be clothed, even at a cost, and current exposure may well reflect a defect in design and in the choice of material. It is thus important to reassess their quality.

In resolving issues pertaining to the representative nature of governments, the United Nations is assuming a function of collective legitimization. In that sense, the hope, once expressed by Sir Hersch Lauterpacht,

> that the political integration of the international community, which, in the long run, is the absolute condition of the full development of the potentialities of man and humanity in general, may, alongside other improvements, render possible the collectivization of the process of recognition as best in keeping with its nature and purpose[240]

has been realized. While Lauterpacht was referring to the recognition of States, not of governments, the legitimizing function of the United Nations is quite similar. In both cases, the United Nations is conceived of as a dispenser of a politically meaningful approval or disapproval of claims relating to the political, moral and legal justification of power. Indeed, while it remains debatable whether States have conferred on the United Nations the power to recognize States,[241] it does appear that they have endorsed its collective legitimization of governments, particularly in light of their reluctance to engage directly and individually in this process *vis-a-vis* other governments.[242]

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240. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 78 (1947).

241. DUGARD, *supra* note 85. Professor Dugard's thesis is that the practice of the United Nations indicates that collective recognition of States through the Organization has become the common mode of operation. Note, however, that in order to justify this claim, the term "recognition" is limited only to its cognitive facet. *Id.*

242. For example, in 1977 the United States Department of State declared that its practice has been "to de-emphasize and avoid the use of recognition in cases of changes of governments and to concern . . with the question of whether we wish to have diplomatic relations with the new governments. The Administration's policy is that the establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct our affairs with other governments directly." L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 20 (1978). In 1980, the United Kingdom announced a similar policy. *See*, C.R. Symmons, *United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose By Another Name?*, PUB. L. 249 (1981). For criticism of this stand, see, M.J. Peterson, *Recognition of Governments Should Not Be Abolished*, 77 AM. J. INT'L L. 31 (1983). Note, however, that for governments reluctant to pursue a policy of individual recognition

It should also be noted that the United Nations has assumed legitimizing functions in various areas (*i.e.*, in the area of decolonization, even at a time when its ability to actually support its words with deeds was quite limited).[243] As the above review indicates, however, the mere assumption by the United Nations of the function of collective legitimization does not in itself ensure that the legitimizing process works well. The coupling of these observations with new political realities that allow for a wider measure of action in support of judgment, indicate that the time has come to revisit the manner in which the United Nations bestows its collective legitimization function in the context of determining the representative nature of an authority purporting to be the government of a member State.

The legitimacy of governments was defined, for our purposes, as comprising relatively objective and subjective elements. The implication is that the search for legitimacy is a search for congruence between the fact of might and the principle of right; between power and authority. This search is based on the insight, derived from both theory and practice, that legitimacy and power are not antithetical; they are interdependent and indeed reinforce each other in much the same way that language requires both a grammar and a vocabulary if it is to allow for meaningful expression. If the United Nations is to discharge its collective legitimizing function in a meaningful way, it has to take account of this insight and to assess the facts of effective power in light of its legal, moral and political dimensions. It is in this manner that a correlation may be achieved between the content of the legitimizing standard and the identity of the collective agent applying the standard. Such correlation is required for the United Nations, as the collective legitimizing agent, to achieve its objective in this context in a manner that augments rather than undermines its viability.

It follows that neither the legitimizing standard nor the legitimizing agent should be positioned in a legal straightjacket any more than they should allow for the free reign of political exigencies. Rather, both should enable the development of rules that are capable of consistent application in practice in a manner that renders the law more respected and more worthy of respect. How, then, is the legal regime governing questions of representation to be reconstructed? How should the process of legitimization work?

Relatively recent developments in the European Community in the

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of foreign governments, transferring that role to the United Nations and transforming the act of recognition from an individual to a collective act, is a rather attractive option. It is the reluctance of governments to give up the right to recognize new States on an individual basis which prevented the clear assumption of this function by the United Nations.

243. See, I.L. Claude Jr., Collective Legitimization as a Political Function of the United Nations, 20 INT'L ORG. 367 (1966).

law and practice of recognition of States may be instructive in this context. On December 16, 1991, the European Community Foreign Ministers meeting in Brussels issued a "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union" [hereinafter Declaration on Guidelines].[244] Accompanying this Declaration on Guidelines was a "Declaration on Yugoslavia."[245] The basic tenets of the Declaration on Guidelines were four-fold. First, they expressed an intention to recognize the new States. Second, they replaced individual recognition with a collective recognition by the European Community. Third, they discarded the legal straightjacket, according to which recognition was but a formal statement of facts, and repositioned it in the realm of foreign policy.[246] Fourth, they articulated conditions which States wishing to be recognized had to meet.[247] The Declaration on Yugoslavia went further to design a method by which an application for recognition is to be submitted and considered.[248]

These developments were criticized for having bred instability. It was claimed that: 1) whereas the traditional criteria for recognition of statehood provided consistency and a defense against doubtful claims, the new stand by the European Community introduced "a new level of ad-hoc decision making that runs the risk of making recognition uncer-

244. *Focus*, Special Issue, Jan. 14, 1992, 92, *reproduced* in 4 EUR. J. INT'L L. 72 (1993).

245. 4 EUR. J. INT'L L., at 73.

246. In declaring that recognition is "subject to the normal standards of international practice and the political realities of each case." *Id.* at 72, Annex 1.

247. States wishing to be recognized had to constitute themselves on a democratic basis; accept appropriate international obligations; commit themselves in good faith to a peaceful process and to negotiations; respect the provisions of the Charter of the United Nations, the commitments subscribed to in the Final Act of Helsinki and the Charter of Paris, especially with regard to the rule of law, democracy and human rights; guarantee the rights of ethnic and national groups and minorities in accordance with the CSCE; respect the inviolability of frontiers that can only be changed by peaceful means and by common agreement; accept relevant commitments regarding disarmament, nuclear nonproliferation, security and regional stability; commit to settle by agreement, including, where appropriate by arbitration, all questions concerning state succession and regional disputes. The Guidelines further stated a policy of non recognition of entities which result from aggression. Finally, the Guidelines stated that account shall be taken of the effects of recognition on neighboring States. Further conditions pertained exclusively to the situation in Yugoslavia and, in addition to conditions in the Declaration on Guidelines, further conditioned recognition on acceptance of provisions laid down in the draft Convention under consideration by the Conference on Yugoslavia, especially those relating to human rights and the rights of national and ethnic groups as well as on continued support for the efforts of the Secretary- General, the Security Council and the Conference on Yugoslavia. *See Focus, supra* note 244.

248. A state seeking recognition had to submit an application by a certain date; the application was to be examined by the arbitration commission (the Badinter commission established on 27 August 1991) and the latter was to render a decision by a certain date. *See supra* note 245, at 74, Annexes, 2-4.

tain and unpredictable";[249] 2) this risk was augmented by the value judgment inherent in the subjective nature of the conditions; and 3) indeed the application of the guidelines in practice was inconsistent, as for instance, in the decision to recognize Bosnia and Herzegovina despite the anarchic situation there, and the dependence of this entity on the presence of foreign troops, as opposed to the decision not to recognize the Republic of Macedonia despite the Commission's decision that it did satisfy all the requisite conditions.[250] We believe that the criticism is unmerited. There is little reason, from both a legal and political perspective to lament the demise of the traditional requirements of statehood that were discarded long ago as being incompatible with the expectations of States as well as with modern practice.[251]

The Guidelines did not change the nature of the recognition from a legal to a political decision. They simply admitted that it was a political decision, and sought to articulate standards to guide that decision to achieve a laudable objective: a principled, collective, foreign policy designed to facilitate peaceful resolutions of bloody conflicts.[252] In most cases, the criteria were applied consistently, and the decisions of arbitration commissions were accepted, the only exception being the case of the Republic of Macedonia.[253] It is quite true that the overall objective was not always achieved, but it does not follow that this failure was due to the introduction of new guidelines for recognition or to the measure of flexibility they retained in order to allow for a perfectly legitimate use of recognition as a diplomatic tool.

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249. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union, in Symposium: Recent Developments in the Practice of States Recognition*, 4 EUR. J. INT'L L., 36 (1993).

250. *Id.*

251. For a discussion, see DUGARD, *supra* note 85, at 78-89.

252. Even those critical of the recent practice of recognition adopted by the European Union admit that the adoption of conditions leading to recognition "is an attempt to introduce a greater moral dimension," and their criticism is directed more at the inconsistent implementation of the new recognition regime, and less at its substantive standards. *See* Rich, *supra* note 249, at 64; D. Turk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66 (1993).

253. In opinion number 6, the Commission found that the Republic of Macedonia satisfied all conditions and that the use of the name "Macedonia" did not imply any territorial claims against another State. The European Community met on January 15, 1992, but its members declined to extend recognition to the Republic of Macedonia. On May 2, the European Community stated that it shall be willing to extend recognition but "under a name that can be accepted by all parties concerned." *See* Rich, *supra* note 250. The President of the Republic of Macedonia declined to meet this condition on the grounds that it is both unprecedented and brings into question the "identity and dignity" of the people of the country. *See* Rich, *supra* note 249. The European Community, due to the *de facto* veto of Greece over its policy, did not extend recognition. *See id.* at 52. It should be noted that had the collective recognition function been assumed by the United Nations, the decision might have been different as Greece could not exercise the same relative power in the international arena.

The use of recognition, of either States or governments, as a diplomatic tool is not new. Its use as a collective means expressing a principled stand by the international community acting through the United Nations with respect to the legitimacy of an authority purporting to be the representative government of a member State may well be a welcome innovation. Its translation into a practical reality calls for a change in the legal regime applicable to this situation.

The elements comprising a legal regime governing questions of legitimate representation need not change. Their content, however, is in need of such change. The following is an initial proposal designed to serve as a basis for consideration of a new regime governing the collective legitimization process exercised by the United Nations in the context of determining the representative nature of governments.

(a) Definition of the problem: the type of challenges to representation to which the regime governing questions of legitimate representation applies: The regime should govern both internal and external challenges to the representative nature of a government. This should be the case because each and every type of challenge raises the issue of representation and a comprehensive legal regime should offer criteria applicable to the issue at hand in its entirety.

(b) Determination of the best available means within the existing institutional framework for resolving challenges as defined in (a) above: It is proposed that the most feasible means - as distinct from the absolute best means - within the institutional framework for resolving challenges to representation as defined in (a) above, are the Rules of Procedure of the General Assembly. The Rules, however, would have to be amended to allow for: 1) the definition of the problem of representation, 2) the articulation of the criteria relevant for its resolution, 3) the forum that would be entrusted with the application of those criteria, and 4) the detailing of its powers and procedure.

(c) Articulation of the criteria to be applied in making a decision: The criteria would have to be based on the following considerations: First, is the decision made in a fluid political context, and designed to bring certain political results, conducive to a better order. Second, does that better order have both objective and subjective characteristics such as: 1) encompassing effective control; 2) ensuring stability; 3) constitutionality; and 4) ensuring that power is exercised in a principled, rather than an arbitrary, manner in accordance with the goals of the international community. Third, is the decision confined to the normative hierarchy of the Charter, and cannot therefore contravene its provisions. Finally, the criteria should be determinate enough to encourage their consistent application and indicate in as clear a manner as possible the expectations of the international community. In light of these considerations, it seems to us that, in determining the issue of representation, the following requirements are to be met for an authority to be recog-

nized as a representative government of a member State:

(i) The authority purporting to be the representative government of a member State has effective control of the country. This requirement concerns the objective component of legitimacy. It is a necessary, yet insufficient, condition for recognition;

(ii) The authority meeting requirement (i) above was neither installed by the intervention of foreign troops nor is it maintained by the presence of such troops. This requirement expresses a positive development in the practice of the Organization and should be transformed from a trend into a principled stand;

(iii) The authority meeting requirements (i) and (ii) above was elected in free and democratic elections. In cases where the authority meeting these requirements has not assumed power as a result of free and democratic elections, its representative nature will not be recognized until and unless such elections take place. This requirement articulates an objective standard for the measurement of the subjective element of legitimacy of governments. It is not concerned with the result of the election, and does not prevent the recognition of an authority whose political platform is undemocratic as the representative government of a member State, but it does require that the people thus represented have been given a fair chance to articulate their preference.

These conditions express minimal requirements in terms of the goals of the international community. Unlike the European Community which represents governments that share a wide consensus on values and could therefore demand conformity to such values by new States seeking recognition from the European Community, the international community enjoys no such consensus. Had it existed, it would have been possible to articulate additional requirements. For instance, the international community could have required that an authority meeting conditions (i) - (iii) not engage in illegal acts in violation of peremptory norms of international law. This requirement would have ensured that the regime seeking legitimacy is not merely an organized power which was elected democratically, but that it exercises that power for making and executing decisions that good government entails.[254] The reference to "good government" in this context would have remained minimal insofar as it would have had a negative content: a regime that violates norms having the character of *jus cogens,* a regime that obstructs the basic goals of the international community, is simply not a regime worthy of recognition. Such a requirement, alas, is not presently feasible because it is not determinate enough, and the lack of consensus surrounding the concept of *jus cogens* would have prevented a meaningful enumeration of such norms, on the one hand, and the con-

254. *See* J.E.S. FAWCETT, THE LAW OF NATIONS 38-39 (1968).

sistent application of the standard, on the other hand.[255]

Nevertheless, the conditions enumerated above present a step forward in allowing for a global alignment on the basis of principle, that takes politics into account while transcending specific factions. It allows for the expression, albeit modest, of a committed and collectivist stand with respect to the issue of representation, as well as, for the development of a politically fair and accountable organization of international relations in a manner that befits its present evolutionary stage. It further accords the issue of representation its proper outfit: it takes account of both the objective and the subjective components of legitimacy, but does so according to the measurements of the body-politic of the international community as is, rather than as it should be, in the eye of a particular beholder.

(d) Choice of the appropriate forum for decision-making: The definition of the problem, the identification of the best available means for the decision-making process, the articulation of the considerations on which the applicable criteria should be based as well as of the criteria themselves, indicate that the appropriate forum should not be the Credentials Committee, but rather a Special Committee of the General Assembly. Such a Committee would not be confined by the Rules of Procedure applicable to the Credentials Committee, and could be empowered to determine issues of representation as defined in (a) - (c) above. The composition of the Special Committee should reflect the political nature of the decision it is requested to make in the heterogeneous community of States.

(e) Delimitation of the type of actions to be taken and the consequences emanating therefrom: Here, there is no change from the existing regime. The Special Committee should be empowered to make a decision favorable to the challenging party, make a decision favorable to the challenged party, or to defer a decision pending the fulfillment of its substantive criteria. The decisions of the Special Committee would then be submitted to the decision of the General Assembly. As a decision on representation determines whether or not a member State will be represented in the United Nations, it is an important decision for the State concerned, for its people, for the authority purporting to be the government and for the international community acting through the United Nations. As such, questions of representation should be classified as an "important question" category within the meaning of article 18(3) of the Charter, and should be decided by a two-thirds majority of members present and voting.

If the proposed regime were applied to the latest round of Cambo-

255. For a discussion on the possibility of collective non-recognition of states and *jus cogens*, see DUGARD, *supra* note 85, at 132-170.

dia's representation debate, the resulting decision may have been the same as the one that was actually reached. Its message and impact, however, would have been quite different, as it would have expressed a principled, rather than an expedient, decision. If the international community is to emerge from the shadow-land of tactical maneuvers into the promised land of strategic vision, it has to become a community of principle.

The existence of a legal right to democratic governance may be debatable,[256] but the need for the United Nations to assist peoples in achieving their aspirations is less so. The Charter of the United Nations begins with reference to "We the Peoples of the United Nations,"[257] and proceeds to state that the peoples have resolved through their "respective Governments"[258] to establish the United Nations to further their aims. A Government that betrays its people, as determined by the criteria and methodology proposed above, is not worthy of respect and consequently, of recognition. The United Nations as a collective legitimizing agent will be acting both within its powers and in a manner that remains true to its promise if it withholds legitimacy in such cases. Making this change may be a step in the development of a legal right to democratic governance but, perhaps more fundamentally, it is a condition for "the full development of the potentialities of man and humanity in general,"[259] and an expression, an "inclusive vision" in a "world that remains divided by many and diverse interests and attributes."[260] Such an expression remains the fundamental role of the United Nations.

256. *See*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

257. *See* U.N. CHARTER Preamble.

258. *Id.*

259. LAUTERPACHT, *supra* text accompanying note 240.

260. *Renewing the United Nations: A Programme for Reform, Report of the Secretary-General*, U.N. GAOR, 51st Sess., U.N. Doc. A/51/950 (1997).